United Nations

Report of the International Law Commission
on the work of its forty-sixth session

2 May-22 July 1994

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Official Records • Forty-ninth Session
Supplement No.10 (A/49/10)

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A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 1994*.

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CHAPTER I

INTRODUCTION

1. The International Law Commission established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its forty-sixth session at its permanent seat at the United Nations Office at Geneva, from 2 May to 22 July 1994.

A. Membership

2. The Commission consists of the following members:

Mr. Husain Al-Baharna (Bahrain)
Mr. Awn Al-Khasawneh (Jordan)
Mr. Gaetano Arangio-Ruiz (Italy)
Mr. Julio Barboza (Argentina)
Mr. Mohamed Bennouna (Morocco)
Mr. Derek William Bowett (United Kingdom)
Mr. Carlos Calero Rodrigues (Brazil)
Mr. James Crawford (Australia)
Mr. John de Saram (Sri Lanka)
Mr. Gudmundur Eiriksson (Iceland)
Mr. Nabil Elaraby (Egypt)
Mr. Salifou Fomba (Mali)
Mr. Mehmet Güney (Turkey)
Mr. Qizhi He (China)
Mr. Kamil Idris (Sudan)
Mr. Andreas Jacovides (Cyprus)
Mr. Peter Kabatsi (Uganda)
Mr. Mochtar Kusuma-Atmadja (Indonesia)
Mr. Ahmed Mahiou (Algeria)
Mr. Vaclav Mikulka (Czech Republic)
Mr. Guillaume Pambou-Tchivounda (Gabon)
Mr. Alain Pellet (France)
Mr. Pemmaraju Sreenivasa Rao (India)
Mr. Edilbert Razafindralambo (Madagascar)
Mr. Patrick Lipton Robinson (Jamaica)
Mr. Robert Rosenstock (United States)
Mr. Alberto Szekely (Mexico)
Mr. Doudou Thiam (Senegal)

Mr. Christian Tomuschat (Germany)
Mr. Edmundo Vargas Carreño (Chile)
Mr. Vladlen Vereshchetin (Russian Federation)
Mr. Francisco Villagran Kramer (Guatemala)
Mr. Chusei Yamada (Japan)
Mr. Alexander Yankov (Bulgaria)

3. Mr. Nabil Elaraby (Egypt) and Mr. Qizhi He (China) were elected at the 2331st meeting of the Commission, on 5 May 1994, to fill the casual vacancies in the Commission created by the election of Mr. Abdul Koroma and Mr. Jiuyong Shi to the International Court of Justice.

B. Officers

4. At its 2328th meeting, on 2 May 1994, the Commission elected the following officers:

Chairman:	Mr. Vladlen Vereshchetin
First Vice-Chairman:	Mr. Chusei Yamada
Second Vice-Chairman:	Mr. Francisco Villagran Kramer
Chairman of the Drafting Committee:	Mr. Derek William Bowett
Rapporteur:	Mr. Peter Kabatsi

5. The Enlarged Bureau of the Commission was composed of the officers of the present session, those members of the Commission who had previously served as Chairman of the Commission, 1/ and the Special Rapporteurs. 2/ The Chairman of the Enlarged Bureau was the Chairman of the Commission. On the recommendation of the Enlarged Bureau, the Commission, at its 2330th meeting, on 4 May 1994, set up for the present session a Planning Group to consider the programme, procedures and working methods of the Commission and its documentation and to report thereon to the Enlarged Bureau. The Planning Group was composed of the following members: Mr. Chusei Yamada (Chairman), Mr. Awn Al-Khasawneh, Mr. Mohamed Bennouna, Mr. Carlos Calero Rodrigues, Mr. John de Saram, Mr. Gudmundur Eiriksson, Mr. Salifou Fomba, Mr. Mehmet Güney, Mr. Andreas Jacovides, Mr. Mochtar Kusuma-Atmadja, Mr. Ahmed Mahiou, Mr. Pemmaraju Sreenivasa Rao, Mr. Edilbert Razafindralambo, Mr. Robert Rosenstock, Mr. Doudou Thiam, Mr. Christian Tomuschat,

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1/ Namely, Mr. Julio Barboza, Mr. Doudou Thiam, Mr. Christian Tomuschat and Mr. Alexander Yankov.

2/ Namely, Mr. Gaetano Arangio-Ruiz, Mr. Julio Barboza, Mr. Robert Rosenstock and Mr. Doudou Thiam.

Mr. Edmundo Vargas Carreño, Mr. Vladlen Vereshchetin and Mr. Alexander Yankov. Mr. Alain Pellet was ex officio member, as Chairman of the Working Group to consider the contribution of the Commission to the United Nations Decade of International Law.

6. The group was open-ended and other members of the Commission were welcome to attend its meetings.

C. Drafting Committee

7. At its 2331st meeting, on 5 May 1994, the Commission agreed that for the topic "The law of the non-navigational uses of international watercourses", the Drafting Committee would include, in addition to its Chairman, Mr. Husain Al-Baharna, Mr. Carlos Calero Rodrigues, Mr. Nabil Elaraby, Mr. Salifou Fomba, Mr. Mehmet Güney, Mr. Kamil Idris, Mr. Peter Kabatsi, Mr. Guillaume Pambou-Tchivounda, Mr. Pemmaraju Sreenivasa Rao, Mr. Alberto Szekely, Mr. Francisco Villagran Kramer, Mr. Chusei Yamada and Mr. Alexander Yankov. Mr. Robert B. Rosenstock participated in his capacity as Special Rapporteur for the topic.

8. The Drafting Committee had the same composition for the topic "International liability for injurious consequences arising out of acts not prohibited by international law". Mr. Julio Barboza participated in his capacity as Special Rapporteur for the topic.

9. Also at its 2331st meeting, the Commission agreed that for the topic "State responsibility", the Drafting Committee would include, in addition to its Chairman, Mr. Awn Al-Khasawneh, Mr. Carlos Calero Rodrigues, Mr. James Crawford, Mr. John de Saram, Mr. Gudmundur Eiriksson, Mr. Nabil Elaraby, Mr. Peter Kabatsi, Mr. Mochtar Kusuma-Atmadja, Mr. Ahmed Mahiou, Mr. Vaclav Mikulka, Mr. Alain Pellet, Mr. Robert Rosenstock and Mr. Christian Tomuschat. Mr. Gaetano Arangio-Ruiz participated in his capacity as Special Rapporteur for the topic.

10. Mr. Peter Kabatsi participated in the work of the Drafting Committee in his capacity as Rapporteur of the Commission.

D. Working Group on a Draft Statute for an International Criminal Court

11. At its 2331st meeting, on 5 May 1994, the Commission re-established its Working Group on a Draft Statute for an International Criminal Court, bearing in mind the request contained in paragraph 6 of General Assembly resolution 48/31, and appointed Mr. James Crawford as Chairman of the Working Group.

12. At its 2332nd meeting, also on 5 May 1994, the Commission approved the following composition for the Working Group: Mr. James Crawford (Chairman), Mr. Husain Al-Baharna, Mr. Awn Al-Khasawneh, Mr. Gaetano Arangio-Ruiz, Mr. Mohamed Bennouna, Mr. Derek William Bowett, Mr. John de Saram, Mr. Gudmundur Eiriksson, Mr. Nabil Elaraby, Mr. Salifou Fomba, Mr. Mehmet Gûney, Mr. Qizhi He, Mr. Kamil Idris, Mr. Pemmaraju Sreenivasa Rao, Mr. Edilbert Razafindralambo, Mr. Patrick Lipton Robinson, Mr. Robert Rosenstock, Mr. Christian Tomuschat, Mr. Vladlen Vereshchetin, Mr. Francisco Villagran Kramer and Mr. Alexander Yankov. Mr. Doudou Thiam participated in his capacity as Special Rapporteur for the topic "Draft Code of Crimes against the Peace and Security of Mankind". Mr. Peter Kabatsi participated in his capacity as Rapporteur of the Commission. The Working Group was open to every member who wished to participate.

E. Secretariat

13. Mr. Hans Corell, Under Secretary-General, the Legal Counsel, attended the session and represented the Secretary-General. Ms. Jacqueline Dauchy, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. Manuel Rama-Montaldo, Senior Legal Officer, served as Senior Assistant Secretary to the Commission; Ms. Mahnoush H. Arsanjani and Mr. Mpazi Sinjela, Legal Officers, and Ms. Virginia Morris, Associate Legal Officer, served as Assistant Secretaries to the Commission.

F. Agenda

14. At its 2328th meeting, on 2 May 1994, the Commission adopted an agenda for its forty-sixth session consisting of the following items:

1. Filling of casual vacancies.
2. Organization of work of the session.
3. State responsibility.
4. Draft Code of Crimes against the Peace and Security of Mankind.
5. The law of the non-navigational uses of international watercourses.
6. International liability for injurious consequences arising out of acts not prohibited by international law.
7. Programme, procedures and working methods of the Commission and its documentation.
8. Cooperation with other bodies.

9. Date and place of the forty-seventh session.

10. Other business.

15. The Commission considered all the items on its agenda. It held 50 public meetings (2328th to 2377th) and, in addition, the Drafting Committee of the Commission held 22 meetings, the Working Group on a draft statute for an international criminal jurisdiction held 27 meetings, the Enlarged Bureau of the Commission held 3 meetings and the Planning Group of the Enlarged Bureau held 3 meetings.

G. General description of the work of the Commission at its forty-sixth session

16. At its forty-sixth session, the Commission achieved major progress on two topics on its agenda: it adopted a draft statute for an international criminal court consisting of 60 articles with commentaries, and concluded the consideration of the topic "The law of the non-navigational uses of international watercourses" by adopting on second reading a complete set of draft articles.

17. In the framework of the topic "Draft Code of Crimes against the Peace and Security of Mankind", the Commission re-established the Working Group on the Draft Statute for an International Criminal Court and entrusted it with the task of reviewing the text elaborated the previous year. [3] The Commission received from the Working Group three reports, the last of which contained the text of a draft statute accompanied by commentaries (A/CN.4/L.491/Rev.2 and Add.1 to 3). [4] The Commission adopted the draft statute and the commentaries to the 60 articles comprising it. It decided to recommend to the General Assembly that it convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court. [5]

18. In the framework of the topic, the Commission started the second reading of the draft Code adopted on first reading at its forty-third (1991) session. It had before it the twelfth report of the Special Rapporteur,

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[3] Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10). The text was considered from the 2339th to 2343rd meetings, held between 3 and 9 May.

[4] The final version of the Working Group's report was examined at the 2374th to 2376th meetings, held on 21 and 22 July 1994.

[5] See Chapter II, Section B I below.

Mr. Doudou Thiam (A/CN.4/460 and Corr.1), which covered draft articles 1 to 15. 6/ After considering these articles in plenary, the Commission referred them to the Drafting Committee. 7/

19. The Commission considered the topic "The law of the non-navigational uses of international watercourses" on the basis of the second report of the Special Rapporteur, Mr. Robert Rosenstock (A/CN.4/462 and Corr.1 (Spanish only)). 8/ The report contained, in addition to a few amendments to draft articles adopted on second reading at the previous session by the Drafting Committee, new texts proposed by the Special Rapporteur for the draft articles not yet considered by the Drafting Committee, namely draft articles 7 and 8 to 32, as well as a new draft article on settlement of disputes. The Commission referred those draft articles to the Drafting Committee. On the basis of the recommendations of the Drafting Committee, it adopted on second reading a complete set of draft articles on the topic and a draft resolution on transboundary confined groundwater. 9/ It also decided 10/ to recommend the draft articles on the law of the non-navigational uses of international watercourses and the resolution on transboundary confined groundwater to the General Assembly, and to recommend the elaboration of a convention by the Assembly or by an international conference of plenipotentiaries on the basis of the draft articles. 11/

20. As regards the topic "State responsibility", the Commission considered: (1) Chapter II of the fifth report (A/CN.4/453/Add.2 and 3) and Chapter III of the sixth report (A/CN.4/461/Add.1) of the Special Rapporteur, Mr. Gaetano Arangio-Ruiz, both devoted to the question of the consequences of internationally wrongful acts characterized as crimes under article 19 of

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6/ The report was examined at the 2344th to 2347th and 2350th meetings, held between 27 May and 7 June 1994.

7/ See Chapter II, Section B II below.

8/ The report was examined at the 2334th to 2338th meetings, held between 9 and 16 May 1994.

9/ The recommendations of the Drafting Committee were examined at the 2353rd to 2356th meetings, held between 21 and 24 June 1994.

10/ The decision was taken at the 2362nd meeting, on 8 July 1994.

11/ See Chaper III below.

Part One of the draft articles; 12/ and (2) Chapter II of the Special Rapporteur's sixth report (A/CN.4/461 and Add.2 and Corr.1) which presented a reappraisal of the pre-countermeasures dispute settlement provisions so far envisaged for the draft on State responsibility. 13/ On the basis of the recommendations of the Drafting Committee as submitted at the previous and current sessions, 14/ the Commission provisionally adopted articles 11 (Countermeasures by an injured State), 13 (Proportionality) and 14 (Prohibited countermeasures). 15/ The Commission deferred action on article 12 (Conditions relating to resort to countermeasures) at this stage and decided that it may have to review article 11 in the light of the text it will eventually adopt for article 12. 16/

21. As regards the topic "International liability for injurious consequences arising out of acts not prohibited by international law", the Commission had before it the tenth report (A/CN.4/459) of the Special Rapporteur, Mr. Julio Barboza. The report was introduced by the Special Rapporteur 17/ but its consideration was deferred to next year. On the basis of the recommendations of the Drafting Committee as submitted by the Committee at the previous and current sessions, the Commission provisionally adopted articles 1 (Scope of the present articles) and paragraphs (a), (b) and (c) of article 2 (Use of terms) as well as ten articles constituting a complete set of provisions on prevention, that is: article 11 (Prior authorization), article 12 (Risk assessment), article 13 (Pre-existing activities), article 14 (Measures to prevent or minimize the risk), article 14 bis [20 bis] (Non-transference of risk), article 15 (Notification and information), article 16 (Exchange of information), article 16 bis (Information to the public), article 17 (National security and industrial secrets), article 18

12/ This aspect was considered at the 2338th to 2343rd and 2348th meetings, held between 13 May and 2 June 1994.

13/ This aspect was considered at the 2353rd meeting on 21 June 1994.

14/ The recommendations of the Drafting Committee were considered at the 2366th and 2367th meetings, held on 13 and 15 July 1994.

15/ For the text of these articles, see footnote 362 below.

16/ See Chapter IV below.

17/ At the 2351st meeting, held on 10 June 1994.

(Consultations on preventive measures), article 19 (Rights of the States likely to be affected) and article 20 (Factors involved in an equitable balance of interests). 18/ 19/

22. Matters relating to the programme, procedures and working methods of the Commission and its documentation were discussed in the framework of the Planning Group of the Enlarged Bureau and in the Enlarged Bureau itself. The relevant recommendations of the Commission are to be found in the last chapter of the report which also deals with cooperation with other bodies and with certain administrative and other matters.

18/ The recommendations of the Drafting Committee were considered at the 2362nd to 2366th meeting, held between 8 and 13 July 1994.

19/ See Chapter V below.

CHAPTER II

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

A. Introduction

23. The General Assembly, in resolution 177 (II) of 21 November 1947, directed the Commission to: (a) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal; and (b) prepare a draft Code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a) above. The Commission, at its first session in 1949, appointed Mr. Jean Spiropoulos Special Rapporteur.

24. On the basis of the reports of the Special Rapporteur, the Commission: (a) at its second session, in 1950, adopted a formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and submitted these principles, with commentaries, to the General Assembly; and (b) at its sixth session, in 1954, submitted a draft Code of offences against the peace and security of mankind, with commentaries, to the General Assembly. 20/

25. The General Assembly, in resolution 897 (IX) of 4 December 1954, considering that the draft Code of offences against the peace and security of mankind as formulated by the Commission raised problems closely related to those of the definition of aggression, and that the General Assembly had entrusted a Special Committee with the task of preparing a report on a draft definition of aggression, decided to postpone consideration of the draft Code until the Special Committee had submitted its report.

26. On the basis of the recommendations of the Special Committee, the General Assembly, in resolution 3314 (XXIX) of 14 December 1974, adopted the Definition of Aggression by consensus.

27. On 10 December 1981, the General Assembly, in resolution 36/106, invited the Commission to resume its work with a view to elaborating the draft Code of offences against the peace and security of mankind and to examine it with the

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20/ Yearbook ... 1950, vol. II, pp. 374-378, document A/1316. Yearbook ... 1954, vol. II, pp. 150-152, document A/2673. For the text of the principles and the draft Code, see also Yearbook ... 1985, vol. II (Part Two), pp. 12 and 8, document A/40/10, paras. 45 and 18.

required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law. 21/

28. The Commission, at its thirty-fourth session, in 1982, appointed Mr. Doudou Thiam Special Rapporteur for the topic. 22/ The Commission, from its thirty-fifth session, in 1983, to its forty-third session, in 1991, received nine reports from the Special Rapporteur. 23/

29. At its forty-third session, in 1991, the Commission provisionally adopted on first reading the draft articles of the draft Code of Crimes against the Peace and Security of Mankind. 24/ At the same session, the Commission decided, in accordance with articles 16 and 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for their comments and observations, with a request that such comments and observations be submitted to the Secretary-General by 1 January 1993. 25/ The Commission noted: that the draft it had completed on first reading constituted the first part of the Commission's work on the topic of the draft Code of Crimes against the Peace and Security of Mankind; and that the Commission would continue at forthcoming sessions to fulfil the mandate the General Assembly had assigned to it in paragraph 3 of resolution 45/41, of

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21/ In resolution 42/151 of 7 December 1987, the General Assembly agreed with the recommendation of the Commission and amended the title of the topic in English to read "Draft Code of Crimes against the Peace and Security of Mankind".

22/ For a detailed discussion of the historical background of this topic, see the Report of the International Law Commission on the work of its thirty-fifth session (Official Records of the General Assembly, Thirty-eighth session, Supplement No. 10, (A/38/10)), paras. 26 to 41.

23/ Yearbook ... 1983, vol. II (Part One), p. 137, document A/CN.4/364; Yearbook ... 1984, vol. II (Part One), p. 89, document A/CN.4/377; Yearbook ... 1985, vol. II (Part One), document A/CN.4/387; Yearbook ... 1986, vol. II, document A/CN.4/398; Yearbook ... 1987, vol. II (Part One), document A/CN.4/404; Yearbook ... 1988, vol. II (Part One), document A/CN.4/411; Yearbook ... 1989, vol. II (Part One), document A/CN.4/419 and Add.1 and Corr.1 and 2 (Spanish only); Yearbook ... 1990, vol. II (Part One), document A/CN.4/430 and Add.1; Yearbook ... 1991, vol. II (Part One), document A/CN.4/435 and Add.1 and Corr.1.

24/ See Official Records of the General Assembly, Forty-sixth session, Supp. No. 10 (A/46/10), para. 173.

25/ Ibid., para. 174.

28 November 1990, which invited the Commission, in its work on the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in its report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism. 26/

30. At its forty-sixth session the General Assembly in its resolution 46/54 of 9 December 1991 invited the Commission, within the framework of the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in the Commission's report on the work of its forty-third session (1991) 27/ concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism, in order to enable the General Assembly to provide guidance on the matter.

31. At its forty-fourth session, in 1992, the Commission had before it the Special Rapporteur's tenth report on the topic (A/CN.4/442), which was entirely devoted to the question of the possible establishment of an international criminal jurisdiction. After considering the Special Rapporteur's report, the Commission decided to set up a Working Group to consider further and analyse the main issues raised in the Commission's report on the work of its forty-second session in 1990 concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international court or other international criminal trial mechanism. In so doing, the Working Group would take into account the issues raised by the Special Rapporteur in his ninth report (Part II) (A/CN.4/435 and Add.1 and Corr.1) and in his tenth report, in the light of the discussions thereon at the Commission's past and current sessions. The Working Group would also draft concrete recommendations with regard to the various issues it would consider and analyse within the framework of its mandate. 28/

26/ Ibid., para. 175. The Commission noted that it had already started to discharge this mandate and its work on this aspect of the topic was reflected in paras. 106 to 165 of its report (ibid.).

27/ Ibid., Forty-fifth session, Supplement No. 10 (A/45/10), chap. II, sect. C.

28/ Ibid., Forty-seventh session, Supplement No. 10 (A/47/10), para. 98.

32. At the same session, the Working Group drew up a report to the Commission containing a summary with specific recommendations, an in extenso report examining and analysing a number of issues related to the possible establishment of an international criminal jurisdiction, as well as an appendix. 29/ The structure suggested in the Working Group's report consisted, in essence, of an international criminal court established by a statute in the form of a multilateral treaty agreed to by States parties and, in the first phase of its operations, at least, it should exercise jurisdiction only over private persons. Its jurisdiction should be limited to crimes of an international character defined in specified international treaties in force, including the crimes defined in the draft Code of Crimes against the Peace and Security of Mankind upon its adoption and entry into force, but not limited thereto. A State should be able to become a party to the statute without thereby becoming a party to the Code. The court would be a facility for States parties to its statute (and also, on defined terms, other States) which could be called into operation when and as soon as required and which, in the first phase of its operation, at least, should not have compulsory jurisdiction and would not be a standing full-time body. Furthermore, whatever the precise structure of the court or other mechanisms (which were also suggested and considered), it must guarantee due process, independence and impartiality in its procedures. 30/

33. Also at the same session, the Commission noted that, with the examination of the Special Rapporteur's ninth and tenth reports, as well as the report by the Working Group, it had concluded the task of analysis of "the question of establishing an international criminal court or other international criminal trial mechanism", entrusted to it by the General Assembly in 1989; 31/ that a structure along the lines suggested in the Working Group's report could be a workable system; that further work on the issue required a renewed mandate from the Assembly to draft a statute; and that it was now for the Assembly

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29/ Ibid., para. 99 and annex.

30/ Ibid., para. 11 and para. 396 of the annex.

31/ Ibid., Forty-fifth session, Supplement No. 10 (A/45/10), paras. 93-158 and more particularly para. 100.

to decide whether the Commission should undertake the project for an international criminal jurisdiction, and on what basis. 32/

34. The General Assembly, in paragraphs 4, 5 and 6 of resolution 47/33 of 25 November 1992, took note with appreciation of chapter II of the report of the International Law Commission (A/47/10), entitled "Draft Code of Crimes against the Peace and Security of Mankind", which was devoted to the question of the possible establishment of an international criminal jurisdiction; invited States to submit to the Secretary-General, if possible before the forty-fifth session of the International Law Commission, written comments on the report of the Working Group on the question of an international criminal jurisdiction; and requested the Commission to continue its work on this question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session.

35. At its forty-fifth session, the Commission had before it the Special Rapporteur's eleventh report on the topic (A/CN.4/449 and Corr.1 (English only)), which was entirely devoted to the question of the establishment of an international criminal jurisdiction. The Commission also had before it in document A/CN.4/448 and Add.1 the comments and observations submitted by Governments, pursuant to the request formulated by the Commission at its forty-third session, on the draft Code of Crimes against the Peace and Security of Mankind, adopted on first reading at that session; 33/ and, in document A/CN.4/452 and Add.1 and 2, the comments submitted by Governments on the report of the Working Group on the question of an international criminal jurisdiction, 34/ further to the invitation contained in paragraph 5 of General Assembly resolution 47/33.

32/ Ibid., Forty-seventh session, Supplement No. 10 (A/47/10), paras. 11 and 104.

33/ See para. 29 above.

34/ See. paras. 31-32 above.

36. After considering the Special Rapporteur's report, the Commission decided to reconvene the Working Group it had established at the previous session, and further decided that the name of the Working Group should thenceforth be "Working Group on a draft statute for an international criminal court". The mandate given by the Commission to the Working Group was as provided in paragraphs 4, 5 and 6 of General Assembly resolution 47/33 of 25 November 1992. 35/

37. The Working Group referred to in the preceding paragraph submitted a report which was annexed to the report of the Commission. 36/

38. The Commission considered that the report of the Working Group represented a substantial advance over that of the 1992 Working Group on the same topic presented to the forty-seventh session of the General Assembly. 37/ The new report placed the emphasis on the elaboration of a comprehensive and systematic set of draft articles with brief commentaries thereto. Though the Commission was not able to examine the draft articles in detail at the forty-fifth session and to proceed with their adoption, it felt that, in principle, the proposed draft articles provided a basis for examination by the General Assembly at its forty-eighth session. 38/

39. The Commission stated that it would welcome comments by the General Assembly and Member States on the specific questions referred to in the commentaries to the various articles, as well as on the draft articles as a whole. It furthermore decided that the draft articles should be transmitted, through the Secretary-General, to Governments with a request that their comments be submitted to the Secretary-General by 15 February 1994. Those comments were necessary to provide guidance for the subsequent work of the Commission with a view to completing the elaboration of the draft statute at the forty-sixth session of the Commission in 1994, as contemplated in its plan of work. 39/

35/ See Official Records of the General Assembly, Forty-eighth session, Supplement No. 10 (A/48/10), paras. 96-97.

36/ Ibid., annex.

37/ Ibid., A/47/10, paras. 339-557.

38/ Ibid., A/48/10, para. 99.

39/ Ibid., para. 100.

40. The General Assembly, in paragraphs 4, 5, 6 and 8 of resolution 48/31 of 4 December 1993, took note with appreciation of chapter II of the report of the International Law Commission, entitled "Draft Code of Crimes against the Peace and Security of Mankind", which was devoted to the question of a draft statute for an international criminal court; invited States to submit to the Secretary-General by 15 February 1994, as requested by the Commission, written comments on the draft articles proposed by the Working Group on a draft statute for an international criminal court; requested the Commission to continue its work as a matter of priority on this question with a view to elaborating a draft statute, if possible at its forty-sixth session in 1994, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States; and requested the Commission to resume at its forty-sixth session the consideration of the draft Code of Crimes against the Peace and Security of Mankind.

41. Pursuant to the resolution referred to in the preceding paragraph, the section of the present report dealing with the consideration of the topic at the present session will be divided into two subsections, namely:

I. Draft statute for an international criminal court;

II. Draft Code of Crimes against the Peace and Security of Mankind.

B. Consideration of the topic at the present session

I. Draft statute for an international criminal court

1. Consideration of the report of the Working Group established at the forty-fifth session

42. The Commission, at its present session, had before it the report of the Working Group on a draft statute for an international criminal court annexed to the report of the Commission on the work of its previous session (1993); 40/ the comments by Governments on the report of the Working Group on a draft statute for an international criminal court; 41/ and chapter B of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-eighth session on the report of the International Law Commission on the work of its forty-fifth session, prepared by the Secretariat. 42/

40/ Ibid., annex.

41/ Document A/CN.4/458 and Add.1-8.

42/ Document A/CN.4/457.

43. The Commission considered the report of the Working Group 43/ at its 2329th to 2334th meetings, held from 3 to 9 May 1994.

44. A summary of the discussion in plenary session is given below.

(a) General observations

45. While some members noted that, notwithstanding certain criticisms, the Commission's work had been well received by Governments, as indicated in the Sixth Committee debate and in the written comments, other members drew attention to the remaining obstacles to be overcome in order to complete the draft statute. There were various comments concerning the need to reconcile the expeditious completion of the draft statute, given its priority, with the care required to draft an instrument that would be generally acceptable to States and provide for the establishment of a viable and effective institution. Attention was drawn to the responsibility of the Commission, as an expert body, to give careful consideration in its continuing work on the draft statute to the views expressed by Governments, notwithstanding the sense of urgency. The opinion was expressed that it would be preferable to take more time, if necessary, to draft an instrument for a better, more useful and permanent institution bearing in mind the unlikelihood that the court would be established by States upon receipt of the draft statute by the General Assembly.

46. While the priority assigned to the draft statute was considered to be sufficiently flexible to envisage the completion of the work at this session or the next, it was generally agreed that the Commission should endeavour to complete the draft statute at the present session, provided this could be done without prejudicing the quality of its work. It was hoped that the Working Group would complete its task in time to enable the Commission to consider the definitive draft statute before the end of the session and forward it with comments to the General Assembly, thus proving its ability to meet the international community's expectations.

47. There were various comments regarding the general approach to be taken by the Commission as it continued its work on the draft statute, with some members drawing attention to the continuing relevance of the principles that had guided the Commission's work and the instruments relating to the ad hoc Tribunal, other members calling for a more ambitious approach and still other members advising a more cautious step-by-step approach. While some members

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43/ See note 40 above.

felt that the draft statute and rules of the ad hoc Tribunal should receive particular attention in addressing similar issues in relation to a permanent court, other members cautioned against placing too much emphasis on those instruments in the light of the essential differences between the two institutions.

48. As regards the question of whether the Commission should be more ambitious or more cautious in its approach, the members who favoured the former approach felt that the present draft was not sufficiently internationalist or universalist in its conception of the court, that it gave too much prominence to inter-State relations rather than a direct relationship between the individual and the international community, that its reliance on the traditional treaty approach might delay the establishment of the court, and that a more cautious approach would not sufficiently take into account the need for new mechanisms to address the recurring problem of ethnic violence in internal as well as international armed conflicts. Those who favoured the latter approach expressed the view that an instrument providing for an international criminal jurisdiction must take into account current international realities, including the need to ensure coordination with the existing system of national jurisdiction and international cooperation, that the establishment and effectiveness of the court required the broad acceptance of the statute by States which might require limiting its scope, that the political aspects of the topic required a realistic approach in which those were left to the decision of States, and that the preparation of the draft statute was, anyway, an unprecedented exercise in creative legislation for the Commission, one that needed to be tempered by a strong sense of practicality.

(b) Nature of the court

49. As regards article 4, while some members felt that the provision struck the right balance in providing for a permanent court that would sit when required to consider a case submitted to it, other members believed that this approach fell short of the task entrusted to the Commission in terms of preparing a statute for a permanent court with the necessary objectivity to try individuals accused of committing serious crimes. Still other members considered that it was for States to decide between the more practical solution of a non-standing permanent body or the more desirable alternative of a full-time organ from the point of view of criminal justice. It was suggested that the draft statute could combine the two approaches by providing for the present realistic and pragmatic arrangement, while at the same time

envisaging the possibility of the court remaining permanently in session in the long term as a way of encouraging uniformity and further development of the law.

50. There were different views as to whether the nature of the court in terms of its relationship to national courts was adequately addressed in the present draft. Some envisaged the court as a facility for States that would supplement rather than supersede national jurisdiction; others envisaged it as an option for prosecution when the States concerned were unwilling or unable to do so, subject to the necessary safeguards against misuse of the court for political purposes. Still other members suggested that it might be appropriate to provide the court with limited inherent jurisdiction for a core of the most serious crimes. The view was expressed that further consideration should be given to existing treaty obligations to try or extradite persons accused of serious crimes, the absence of an implied waiver of national court jurisdiction by virtue of the establishment of the court, the residual nature of the court's jurisdiction as an additional element to the existing regime based on the options of trial, extradition or referral to the court, as well as the possibility of advisory jurisdiction to assist national courts in the interpretation of the relevant treaties, as in the case of the Inter-American Court of Human Rights. There were also suggestions that the court should have discretion to decline to exercise its jurisdiction if the case was not of sufficient gravity or could be adequately handled by a national court. This suggestion was explained in terms of ensuring that the court would deal solely with the most serious crimes, not encroach on the functions of national courts, and that it would adapt its caseload to the resources available. In this context, attention was drawn to the experience of the European Court of Human Rights.

(c) Method of establishing the court

51. As to the method of establishing the court, some members favoured an amendment to the United Nations Charter, while others favoured the conclusion of a treaty. A view was also expressed in favour of the adoption of a resolution by the General Assembly and/or the Security Council. While recognizing the practical difficulties of the first approach, some members were not prepared to rule out the possibility of a Charter amendment which would make the draft statute an integral part of the Charter, like the Statute of the International Court of Justice, with binding effect on all Member States when the requirements for its entry into force had been met. Those who

preferred the second approach believed that a treaty would provide a firm legal foundation for the judgments delivered against the perpetrators of international crimes, enable States to decide whether or not to accept the draft statute and the jurisdiction of the court, particularly in view of the sensitive issue of national criminal jurisdiction, and avoid the practical difficulties of amending the Charter as well as the possible challenges to the legitimacy of a body established by resolution. The view was expressed that the treaty approach would require ensuring that the draft statute was widely accepted by States before its entry into force and also addressing the role of States parties in greater detail in the statute. In favour of the third approach, the need was stressed for ensuring the international or universal character of the court as a judicial organ of the international community rather than of a limited group of States parties, as well as the desirability of avoiding the delays in establishing the court that might result from the adoption of other approaches. The view was also expressed that the method of establishing a court, which would have implications in terms of its relationship to the United Nations, was a political question to be decided by States, and that the Statute and commentary should both reflect the various possibilities.

52. There were different views as to whether a permanent court could be established as a subsidiary organ of the General Assembly or the Security Council or possibly as a joint subsidiary organ in view of their respective areas of competence. As regards the General Assembly, some members pointed out that the court could be established as a subsidiary organ under Article 22 of the United Nations Charter, its authority to establish a judicial organ having been confirmed by the International Court of Justice in its advisory opinion of 13 July 1954. However, other members questioned whether such a resolution of a recommendatory nature would provide a sound legal basis for the establishment of a criminal court, and in particular for its exercise of powers against individuals, and whether such an institution could be viewed as a subsidiary organ performing the functions entrusted to the General Assembly under the Charter. It was suggested that the General Assembly could adopt a resolution recommending the adoption of the statute of the Court as a treaty by States, to avoid any uncertainties concerning the legal effect of the resolution and any jurisdictional questions with respect to a State that had not voted in favour of the resolution. There was a further suggestion that the court could be established as both a treaty

body and a subsidiary organ of the Security Council by means of concurrent resolutions of the Security Council and the General Assembly later submitted to States for ratification, with the Security Council having recourse to the court in response to Chapter VII situations before the entry into force of the instrument. However, other members distinguished between the authority of the Security Council to establish an ad hoc tribunal in response to a particular situation under Chapter VII of the Charter and the authority to establish a permanent institution with general powers and competence. Chapter VII of the Charter only envisaged action with respect to a particular situation.

(d) Relationship to the United Nations

53. There was general agreement on the importance of establishing a close relationship between the United Nations and the court to ensure its international character and its moral authority. However, there were different views as to the appropriate means for achieving this end which were closely related to the question of the method of establishing the court. While some members preferred the first alternative in article 2 as a means of ensuring that perpetrators of serious crimes of international concern would be prosecuted on behalf of the international community rather than by a group of States Parties, other members felt that the second alternative offered a more pragmatic and realistic approach in view of the difficulties involved in amending the Charter.

54. While some members suggested that the character of the court as an institution of the international community could also be achieved by means of its establishment by a resolution of the General Assembly or the Security Council, other members questioned the establishment of a permanent judicial body by either the General Assembly or the Security Council because of the political character of those organs. It was suggested that further consideration should be given to the possibility of bringing the court into relationship with the United Nations by means of a special agreement.

55. The view was expressed that the relationship between the proposed court and the United Nations should be determined as a preliminary matter since this would have implications for a number of unresolved issues, such as the financing of the tribunal and the recruitment of its personnel. However, it was also suggested that the Commission's primary task was to produce a defensible structure for a court and that the issue of its relationship with the United Nations could be resolved at a later stage on the basis of various models of relationship with the United Nations.

(e) Law to be applied by the court

56. The view was expressed that the relationship between the substantive law to be applied by the court and the procedural law represented by the statute had received insufficient attention. The problem of substantive law should not be confused with the procedural law currently embodied in the statute, and the question of determining the applicable law required consideration of substantive law which could not be adequately addressed in the statute because of the continuing vagueness of the rules of substantive law to be applied. Some members felt that the problems of applicable law and subject-matter jurisdiction could be resolved by the completion of the Code and therefore suggested that work on this project should be accelerated. However, other members believed that the court should apply existing conventions and the relevant provisions of national law adopted pursuant to those conventions, as envisioned in the present draft statute, at least in the initial stage of its work. It was suggested that the statute should be drafted in such a way as not to foreclose the future application of the Code.

57. Some members attributed particular importance to the applicability of national law, not only in instances where a treaty did not define a crime with the necessary precision, but also with respect to rules of evidence and penalties. Other members attributed greater importance to the application of customary law and *jus cogens*, particularly in the light of the Nürnberg precedent. It was pointed out, however, that in the event of conflict international law would prevail over national law, and that the *nullum crimen* principle was itself a rule of international law.

(f) Jurisdiction

(i) Personal jurisdiction

58. As regards personal jurisdiction, attention was drawn to the Nürnberg Judgment affirming that crimes against the law of nations were committed by men, not by abstract entities. The remark was made that while the difficulty of bringing the perpetrators to justice should not be underestimated, it was important that perpetrators of crimes should be aware of this eventuality. The view was expressed that the present State consent requirements for personal jurisdiction were too complex and did not sufficiently take into account other extradition obligations.

(ii) Subject-matter jurisdiction

59. There were several remarks concerning the complexity of the subject-matter jurisdiction provisions, the need to simplify those provisions

to make them more comprehensible and to distinguish between subject-matter jurisdiction and the conferral of jurisdiction. There were various suggestions for modifying the list of treaties contained in article 22, including narrowing the list to encompass widely accepted multilateral conventions dealing with serious crimes of concern to all States; expanding it to include other treaties, such as the Convention against Torture; and adding a provision to facilitate the addition of treaties that may be concluded or enter into force in the future. Some questions were raised as to the logic and the usefulness of maintaining the distinction drawn between the two categories of treaties and whether the jurisdictional criterion of exceptionally serious violations should not apply to all of the conventions. It was noted that the final decision concerning the list of treaties was a matter to be decided by States, possibly at a future diplomatic conference.

60. As regards crimes under general international law, some members considered it important to fill the void when the relevant treaties could not be invoked for reasons of non-ratification or when the crimes were not defined by treaty, notably aggression and crimes against humanity. Other members expressed concern regarding the vagueness or ambiguity of the reference to crimes under international law, and doubted whether customary law defined the crimes with the necessary precision. It was suggested that greater clarity could be achieved by defining or at least listing the crimes to be included within this category. In this regard, different views were expressed as to whether the definition of aggression should be limited to wars of aggression or should also extend to a single act of aggression; some members questioning the meaningfulness of the distinction.

(g) State acceptance of jurisdiction

61. As regards State acceptance of jurisdiction, some members who favoured the approach of opting in emphasized the importance of the voluntary acceptance of the jurisdiction of the court, distinguishing acceptance of the statute of the court from acceptance of its jurisdiction, the dependence of the court on the cooperation of States, and the need to limit the jurisdiction of the court to situations in which national courts were unable or unwilling to exercise jurisdiction. Those who favoured the opting out approach questioned the value of becoming a party to the statute without accepting the jurisdiction of the court and warned against creating an ineffective institution as a result of excessive restrictions on its jurisdiction. It was

suggested that the statute should envisage some exceptions to the optional nature of the acceptance of jurisdiction with respect to a limited number of particularly serious crimes, such as genocide.

(h) Election of the judges

62. There was general agreement that the term of office for judges envisaged in the present draft was too long and should be reduced to a shorter period. The view was expressed that the qualifications of judges required further consideration to ensure the necessary competence and experience in the respective chambers. It was also suggested that the election of judges should take into account the need to ensure equitable geographical representation reflecting the main legal systems and that there should be some limitation on the disqualification of judges by the accused to avoid abuse.

(i) Structure of the court

63. There were different views as to whether the term "Tribunal" should be used to refer to the overarching structure of the court, with some members noting its historical antecedents and others finding it confusing or misleading.

(j) Submission of cases to the court

64. As regards the submission of cases to the court by States, some members felt that this should be limited to States parties to encourage wide adherence to the statute, other members felt that permitting any State or the Prosecutor to refer cases of serious crimes would increase the likelihood of prosecution, and still other members considered it appropriate to permit any State to refer cases involving lesser crimes by agreement.

65. There was general agreement that the powers of the Security Council were determined by the United Nations Charter and could be neither restricted nor expanded by the statute. On this basis, many members thought that it would be appropriate for the Council to refer situations rather than cases against particular individuals to the court when the requirements of Chapter VII were met. Attention was drawn to the distinction between the referral of a situation by the Security Council and the independent investigation to be conducted by the Procuracy. This approach was considered by some to be too bold in not expressly limiting Security Council action to Chapter VII situations and too timid in not permitting the Security Council to request the prosecution of particular persons when those requirements were met. There were some concerns regarding respect for the principles of non-discrimination and equal justice as a consequence of the veto.

66. There were different views as to whether the General Assembly should also be able to refer cases to the court or at least draw its attention to certain situations. Those who favoured conferring such a role on the General Assembly drew attention to its status as a primary organ of the United Nations, its character as the most representative body of the international community, its primary competence regarding human rights as well as its residual competence regarding international peace and security, and the possibility of inaction by the Security Council as a result of the veto. However, other members drew a distinction between the Security Council and the General Assembly in terms of the legal effect of their decisions under the Charter and questioned whether the necessary legal consequences of the referral of a matter to the court could flow from a recommendation.

(k) State consent requirements for jurisdiction

67. There were different views as to the requirements of acceptance by States for instituting proceedings, with some members emphasizing the importance of obtaining the consent of the custodial State to ensure the presence of the accused and the territorial State to facilitate the investigation and collection of evidence, and other members emphasizing that States should not be able to interfere with the trial of persons who happened to be on their territory or their nationals with a view to preventing the court from functioning and thereby providing impunity. Attention was drawn to the possibility of Security Council action providing a substitute for the State consent requirements. It was also suggested that the court should be able to exercise some inherent jurisdiction with respect to the most serious crimes, such as genocide, which would not require State consent.

68. While some members attached importance to a Security Council determination of aggression as a precondition to the exercise of jurisdiction by the court, other members suggested that the implications of requiring such a determination required further consideration. The view was expressed that it might be useful to envisage a broader role for the Security Council in the light of its involvement in a multiplicity of conflicts and situations around the world as well as the risk of mischievous or harassment-type litigation. In the absence of Security Council action, it was suggested that the Procuracy might be given the right to notify the Security Council of the charges of aggression. The remark was made that an individual charged with aggression should be permitted to prove that the State policy constituted legitimate self-defence.

(l) Prosecuting authority

69. There were a number of suggestions regarding the Procuracy, including entrusting the powers to a collegial body rather than an individual, enlarging the Procuracy to ensure the proper administration of justice, and providing greater respect for the independence of the prosecutor in the removal procedures. The conferral of investigative and prosecutorial powers on a single entity also gave rise to some concern.

(m) Handing over of an accused person to the court

70. Attention was drawn to a number of issues which required further consideration, including the relationship between the regime to be established and existing extradition or status of forces agreements, whether surrendering a person to the court would constitute compliance with extradition obligations, whether the custodial State should have the option of granting an extradition request rather than handing the person over to the court, whether the requested State should have any discretion concerning the surrender of the accused to the court, and whether a State engaged in an investigation of the crime should be allowed to delay handing over the person. However, there were some concerns about creating procedural obstacles that would enable a State to prevent the court from prosecuting persons for crimes of international concern that offended the conscience of mankind.

(n) Trial proceedings

71. As regards trials in absentia, many members expressed the view that such trials were not precluded by the International Covenant on Civil and Political Rights, and expressed satisfaction with the present draft in permitting the court to function notwithstanding the deliberate absence of the accused. On the other hand, others characterized trials in absentia as contrary to important judicial guarantees and questioned whether a statute envisaging such trials would be broadly acceptable to States. It was suggested that further consideration should be given to the policy question of permitting such trials, to the need to provide appropriate safeguards for the rights of the accused, and to whether substantially the same results could be achieved by other means, as in the case of the ad hoc Tribunal.

72. As regards the non bis in idem principle, while some members drew attention to the relevant provisions in the Statute of the ad hoc Tribunal, other members expressed concern about the court reviewing the decisions of national courts.

73. With regard to the judgment of the trial chamber, there were different views as to whether dissenting or separate opinions should be permitted in the context of a criminal court.

(o) Penalties

74. There was a suggestion that it may be necessary to give the court discretion to determine the applicable law with respect to penalties which were not provided for in the Code of Crimes against the Peace and Security of Mankind or the relevant treaties. However, the view was expressed that reliance on national law provisions could only serve as a temporary expedient since such an arrangement could result in inconsistencies in the application of penalties by the court which would be incompatible with the nature of the court and inconsistent with the principle of judicial justice. There was a further suggestion to delete the provision concerning fines or to address this question in the context of miscellaneous or budgetary matters.

(p) Rules of Procedure

75. There was general agreement that the statute should contain the essential procedural and evidentiary rules, particularly as those rules related to the rights of the accused and the notion of a fair trial, with the more detailed provisions to be worked out at a later stage. While some members favoured the elaboration of the rules by the judges, other members preferred appointing a group of experts to perform the task to enable States to consider the content of the rules in assessing the statute. The view was expressed that there should be some mechanism providing for the approval of the rules by the States parties to the statute.

(q) Financing the Tribunal

76. As regards the financing of the tribunal, attention was drawn to the need to consider the financial and other resources required for an institution like the tribunal, the implications that the method of establishment of the court would have on its financing, and the importance of ensuring the financial viability of the tribunal.

2. Re-establishment of the Working Group on a draft statute for an international criminal court

77. The Commission at its 2331st and 2332nd meetings held on 5 May 1994 decided to re-establish a Working Group on a draft statute for an international criminal court.

78. The mandate given by the Commission to the Working Group was in accordance with paragraphs 4, 5 and 6 of General Assembly resolution 48/31

of 9 December 1993. In those paragraphs, the Assembly had taken note with appreciation of chapter 11 of the report of the International Law Commission, entitled "Draft Code of Crimes against the Peace and Security of Mankind" which was devoted to the question of a draft statute for an international criminal court; invited States to submit to the Secretary-General by 15 February 1994, as requested by the International Law Commission, written comments on the draft articles proposed by the Working Group on a draft statute for an international criminal court and requested the International Law Commission to continue its work as a matter of priority on this question with a view to elaborating a draft statute if possible at its forty-sixth session in 1994, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States.

79. The Working Group held 27 meetings between 10 May and 14 July 1994.

80. In performing its mandate, the Working Group had before it the report of the Working Group on the question of an international criminal jurisdiction included in the Commission's report at its forty-fourth (1992) session (A/47/10), Annex); the report of the Working Group on a draft statute for an international criminal court included in the Commission's report at its previous (1993) session (A/48/10, Annex); the eleventh report on the topic "Draft Code of Crimes against the Peace and Security of Mankind" presented by the Special Rapporteur, Mr. Doudou Thiam at the previous session (A/CN.4/449 and Corr.1, English only); the comments of Governments on the report of the Working Group on the question of an international criminal jurisdiction (document A/CN.4/458 and Adds.1 to 5); chapter B of the topical summary prepared by the Secretariat of the discussion held in the Sixth Committee of the General Assembly during the forty-eighth session, on the report of the International Law Commission on the work of its forty-fifth session (A/CN.4/446); the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (document S/25704); the rules of procedure and evidence adopted by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (document IT/32 of 14 March 1994) as well as the following informal documents prepared by the Secretariat of the Working Group: (a) a compilation of draft statutes for an international criminal court elaborated in the past either within the framework of United Nations or by other public or private entities; (b) a compilation of conventions or relevant provisions of conventions

relative to the possible subject-matter jurisdiction of an international criminal court and (c) a study on possible ways whereby an international criminal court might enter into relationship with the United Nations.

81. The Working Group proceeded to a re-examination chapter by chapter, and article by article of the preliminary draft statute for an international criminal court annexed to the Commission's report at the preceding session 44/ bearing in mind, inter alia, (a) the need to streamline and simplify the articles concerning the subject matter jurisdiction of the court, while better determining the extent of such jurisdiction; (b) the fact that the court's system should be conceived as complementary with national systems which function on the basis of existing mechanisms for international cooperation and judicial assistance and (c) the need for coordinating the common articles to be found in the draft statute for an international criminal court and in the draft Code of Crimes against the Peace and Security of Mankind.

82. The draft statute prepared by the Working Group is divided into eight main parts: Part 1 on Establishment of the Court; Part 2 on Composition and Administration of the Court; Part 3 on Jurisdiction of the Court; Part 4 on Investigation and Prosecution; Part 5 on the Trial; Part 6 on Appeal and Review; Part 7 on International Cooperation and Judicial Assistance; and Part 8 on Enforcement.

83. The commentaries to the draft articles explain the special concerns which the Working Group has addressed in considering a provision on a given subject-matter and the various views to which it gave rise or the reservations which it aroused.

84. In drafting the statute, the Working Group did not purport to adjust itself to any specific criminal legal system but rather, to amalgamate into a coherent whole the most appropriate elements for the goals envisaged, having regard to existing treaties, earlier proposals for an international court or tribunals and relevant provisions in national criminal justice systems within the different legal traditions.

44/ Official Records of The General Assembly, forty-eighth session, Supp. No. 10, A/48/10, Annex.

85. Careful note was also taken of the various provisions regulating the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991.

86. It is also to be noted that the Working Group has conceived the statute for an international criminal court as an attachment to a future international convention on the matter and has drafted the statute's provisions accordingly.

87. At its 2374th to 2376th meetings held on 21 and 22 July 1994, the Commission considered the final report of the Working Group which contained the complete text of a draft statute consisting of 60 articles with commentaries thereto.

88. At its 2374th meeting, the Commission adopted the draft statute. At that same meeting and at the 2375th and 2376th meetings, the Commission adopted the commentaries to the 60 articles comprising the draft statute

3. Tribute to the Chairmen of the successive Working Groups

89. The Commission expressed gratitude to the Chairmen of the Working Groups it established at its 1992 and 1993 sessions, Mr. Doudou Thiam and Mr. Abdul G. Koroma. It paid a special tribute to the Chairman of the Working Group at the present session, Mr. James Crawford, for the outstanding contribution he made to the preparation of the draft statute by his tireless efforts and devoted work.

4. Recommendation of the Commission

90. At its 2376th meeting, on 22 July 1994, the Commission decided, in accordance with article 23 of its statute to recommend to the General Assembly that it convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court.

5. Draft Statute for an international criminal court

91. The text of, and commentaries to draft articles 1 to 60 and the Annex thereto as well as three Appendices are reproduced below.

DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

The States parties to this Statute,

Desiring to further international cooperation to enhance the effective prosecution and suppression of crimes of international concern, and for that purpose to establish an international criminal court;

Emphasizing that such a court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole;

Emphasizing further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective;

Have agreed as follows:

Commentary

(1) The preamble sets out the main purposes of the draft Statute, which is intended to further cooperation in international criminal matters, to provide a forum for trial and, in the event of conviction, to provide for appropriate punishment of persons accused of crimes of significant international concern. In particular it is intended to operate in cases where there is no prospect of those persons being duly tried in national courts. The emphasis is thus on the Court as a body which will complement existing national jurisdictions and existing procedures for international judicial cooperation in criminal matters and which is not intended to exclude the existing jurisdiction of national courts, or to affect the right of States to seek extradition and other forms of international judicial assistance under existing arrangements.

(2) The International Criminal Court envisaged by the draft Statute is intended to exercise jurisdiction only over the most serious crimes, that is to say, crimes of concern to the international community as a whole. Its jurisdiction is stated exhaustively in the Statute (see Part 3 below), and the circumstances in which it should exercise that jurisdiction are also carefully circumscribed.

(3) The purposes set out in the preamble are intended to assist in the interpretation and application of the Statute, and in particular in the exercise of the power conferred by article 35.

(4) Some members believed the preamble should be an operative article of the statute, given its importance.

PART 1: ESTABLISHMENT OF THE COURT

Article 1

The Court

There is established an International Criminal Court ("the Court"), whose jurisdiction and functioning shall be governed by the provisions of this Statute.

Commentary

(1) Part 1 of the draft Statute deals with the establishment of the Court. Article 1 formally establishes an International Criminal Court (hereinafter referred to as "the Court").

(2) The purpose of the establishment of the Court, as indicated in the preamble, is to provide a venue for the fair trial of persons accused of crimes of an international character, in circumstances where other trial procedures may not be available or may be ineffective.

(3) The question of the title to be given to the jurisdictional structure was the subject of some debate. In the 1993 draft articles the entity as a whole was referred to as the "Tribunal", with the term "Court" reserved for the judicial organs. However some members thought that it was unusual to have a "Court" within a "Tribunal", and others preferred not to use the word "Tribunal" at all in relation to a permanent body intended to exercise criminal jurisdiction. The Commission agreed that the term "Court" should be used to refer to the entity as a whole, and that where specific functions are intended to be exercised by particular organs (e.g. the Presidency, the Procuracy, the Registry), this would be specifically stated. References to "the Court" as a whole are made in a number of articles: these confer powers, functions or obligations on all the organs of the Court as described in article 5, or in the case of judicial powers, on the Presidency, a Trial Chamber, or the Appeals Chamber, as the case may be: see articles 4, 18, 24, 33, 43 and 51 (1).

Article 2

Relationship of the Court to the United Nations

> The President, with the approval of the States parties to this Statute ("States parties"), may conclude an agreement establishing an appropriate relationship between the Court and the United Nations.

Commentary

(1) Divergent views were expressed in the Commission on the relationship of the Court to the United Nations. Several members of the Commission favoured the Court becoming a subsidiary organ of the United Nations by way of resolutions of the Security Council and General Assembly, without the need for any treaty. Others strongly preferred that it be created an organ of the United Nations by amendment to the Charter of the United Nations. Still others thought such an amendment unrealistic and even undesirable at this

stage, and advocated another kind of link with the United Nations such as a relationship agreement along the lines of that concluded between the United Nations and the International Atomic Energy Agency (see the IAEA's Statute of 23 October 1956, article XVI, and General Assembly resolution 1145 (XII) of 14 November 1957).

(2) One view that was strongly advanced favoured a jurisdictional structure based on resolutions of the General Assembly and Security Council, on the ground that this would reflect the will of the international community as a whole, would be more flexible, and would bring the Court within the framework of the United Nations without the need for an amendment to the Charter. Adoption of the Statute by a treaty to which only some States would be parties would be an unsatisfactory alternative, since the States on whose territory terrible crimes were committed would not necessarily be parties to the Statute; in some cases, such States were the least likely to become parties. To adopt the Statute by treaty could give the impression of a circle of "virtuous" States as between whom, in practice, cases requiring the involvement of the Court would not arise.

(3) However the Commission concluded that it would be extremely difficult to establish the Court by resolution of a United Nations body, without the support of a treaty. General Assembly resolutions do not impose binding, legal obligations on States in relation to conduct external to the functioning of the United Nations itself. In the present case important obligations - for example the obligation of a State to transfer an accused person from its own custody to the custody of the Court - which are essential to the Court's functioning could not be imposed by resolution. A treaty commitment is essential for this purpose. Moreover, a treaty accepted by a State pursuant to its constitutional procedures will normally have the force of law within that State - unlike a resolution - and that may be necessary if that State needs to take action vis-à-vis individuals within its jurisdiction pursuant to the Statute. And, finally, resolutions can be readily amended or even revoked: that would scarcely be consistent with the concept of a permanent judicial body.

(4) As between the solution of a treaty and an amendment to the Charter, the majority preferred the former, and it is reflected in the text of article 2. This envisages a relationship agreement accepted by the competent organs of the United Nations and on behalf of the Court, but with the States parties to the Statute creating the Court assuming the responsibility for its operation.

This relationship agreement would be concluded between the Presidency, acting on behalf of and with the prior approval of States parties, and the United Nations, and it would provide, inter alia, for the exercise by the United Nations of the powers and functions referred to in the Statute.

(5) On the other hand, some members felt strongly that the Court could only fulfil its proper role if it was made an organ of the United Nations by amendment of the Charter. In their view, the Court is intended as an expression of the organized international community as to its concern about and desire to suppress certain most serious crimes. It is logical that the Court be organically linked with the United Nations as the manifestation of that community. They would therefore prefer article 2 to provide simply that "The Court shall be a judicial organ of the United Nations".

(6) If this alternative were to be adopted it would have substantial implications for the operation and financing of the Court. For example, election of judges and other officers would naturally become a matter for Member States acting through the competent political organs of the United Nations. The Commission envisages that such a solution would require amendment to or reconsideration of, inter alia, articles 3 (Seat of the Court), 4 (Status and legal capacity), 6 (Qualification and election of judges) and 19 (Rules of the Court).

(7) Despite this disagreement at the level of technique, it was agreed that the Court could only operate effectively if brought into a close relationship with the United Nations, both for administrative purposes, in order to enhance its universality, authority and permanence, and because in part the exercise of the Court's jurisdiction could be consequential upon decisions by the Security Council: see article 23. The issue of budgetary obligations will also need to be resolved.

(8) Some of the links with the United Nations are provided for in the draft Statute. Other important questions (e.g. budgetary arrangements) will need to be worked out as part of the process of adoption of a Statute. The Commission has not sought to elaborate the latter group of questions, which can only satisfactorily be worked out in the context of an overall willingness of States to proceed to the establishment of a Court. See Appendix I on covering clauses and see further Appendix III for a review of the various options for relating an entity such as the Court to the United Nations.

Article 3

Seat of the Court

1. The seat of the Court shall be established at ... in ... ("the host State").

2. The President, with the approval of the States parties, may conclude an agreement with the host State establishing the relationship between that State and the Court.

3. The Court may exercise its powers and functions on the territory of any State party and, by special agreement, on the territory of any other State.

Commentary

(1) An agreement will need to be entered into on behalf of the Court with the State which agrees to act as its host. This agreement should be formally entered into by the President acting with the prior approval of the States parties.

(2) It is envisaged that the State in whose territory the Court is to be located should also provide prison facilities for the detention of persons convicted under the Statute, in the absence of other arrangements under article 59. This is without prejudice to the question of meeting the costs of detention, for which provision will need to be made.

(3) Although trials will be held in the seat of the Court, unless otherwise decided (see art. 32), other powers and functions of the Court and its various organs may have to be exercised elsewhere, whether in the territory of States parties pursuant to cooperation arrangements with the Court (cf. art. 51), or even in the territory of States not parties to the Statute, by special arrangement (see art. 56).

Article 4

Status and legal capacity

1. The Court is a permanent institution open to States parties in accordance with this Statute. It shall act when required to consider a case submitted to it.

2. The Court shall enjoy in the territory of each State party such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

Commentary

(1) Paragraph 1 of article 4 reflects the goals of flexibility and cost-reduction set out in the report of the 1992 Working Group which laid down the basic parameters for the draft Statute (General Assembly Official Records, Forty-seventh session, Supp. No. 10 (A/47/10), p. 143). While the Court is a permanent institution, it shall sit only when required to consider a case submitted to it. Some members of the Commission continued to feel that this was incompatible with the necessary permanence, stability and independence of a true international criminal court.

(2) The Court should benefit in the territory of each State party from such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

PART 2: COMPOSITION AND ADMINISTRATION OF THE COURT

Article 5

Organs of the Court

The Court consists of the following organs:

(a) a Presidency, as provided in article 8;

(b) an Appeals Chamber, Trial Chambers and other chambers, as provided in article 9;

(c) a Procuracy, as provided in article 12; and

(d) a Registry, as provided in article 13.

Commentary

(1) Article 5 specifies the structure of the international judicial system to be created and its component parts. Strictly judicial functions are to be performed by the Presidency (as to which see art. 8), and various chambers (see art. 9). The crucial function of the investigation and prosecution of offenders is to be performed by an independent organ, the Procuracy (see art. 12). The principal administrative organ of the Court is the Registry (see art. 13). For conceptual, logistical and other reasons, the three organs are to be considered as constituting an international judicial system as a whole, notwithstanding the necessary independence which has to exist, for ethical and fair trial reasons, between the judicial organ and the Prosecutor.

(2) Care has been taken throughout the Statute to refer, as the case may be, to the Court as a whole, or to particular organs intended to perform

particular functions. So far as judicial functions are concerned, in the pre-trial phase these are largely of a preliminary or procedural character and are entrusted to the Presidency (cf. art. 8 (4)). Once a Trial Chamber or the Appeals Chamber is seized of a case, that Chamber will exercise the various powers and functions attributed to the Court as a whole (see arts. 38 (5) and 49 (1)).

Article 6

Qualification and election of judges

1. The judges of the Court shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices, and have, in addition:

(a) criminal trial experience;

(b) recognized competence in international law.

2. Each State party may nominate for election not more than two persons, of different nationality, who possess the qualification referred to in paragraph 1 (a) or that referred to in paragraph 1 (b), and who are willing to serve as may be required on the Court.

3. Eighteen judges shall be elected by an absolute majority vote of the States parties by secret ballot. Ten judges shall first be elected, from among the persons nominated as having the qualification referred to in paragraph 1 (a). Eight judges shall then be elected, from among the persons nominated as having the qualification referred to in paragraph 1 (b).

4. No two judges may be nationals of the same State.

5. States parties should bear in mind in the election of the judges that the representation of the principal legal systems of the world should be assured.

6. Judges hold office for a term of nine years and, subject to paragraph 7 and article 7 (2), are not eligible for re-election. A judge shall, however, continue in office in order to complete any case the hearing of which has commenced.

7. At the first election, six judges chosen by lot shall serve for a term of three years and are eligible for re-election; six judges chosen by lot shall serve for a term of six years; and the remainder shall serve for a term of nine years.

8. Judges nominated as having the qualification referred to in paragraph 1 (a) or 1 (b), as the case may be, shall be replaced by persons nominated as having the same qualification.

Commentary

(1) Article 6 lays down the basic requirement that judges be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. It also addresses the difficult issue of the balance of qualifications required of the judges as between criminal law and criminal trial experience (the importance of which was stressed in many comments by States and during the Sixth Committee debate) and expertise in the field of international law.

(2) In order to strike an appropriate balance between these two needs, article 6 provides for separate elections of persons nominated with qualifications in criminal law and procedure or international law. The requirement of criminal trial experience is understood to include experience as judge, prosecutor or advocate in criminal cases. The requirement of recognized competence in international law may be met by competence in international humanitarian law and international human rights law. Three of the 10 judges elected from nominees with criminal trial experience will serve on each Trial Chamber: see article 9 (5). The eight judges elected from nominees with recognized competence in international law will ensure the degree of competence in international law which the Court will undoubtedly need. This does not exclude the possibility of persons being nominated with both criminal trial experience and recognized competence in international law. In such cases, it will be a matter for the nominating States to specify whether a person is nominated as having criminal trial experience or recognized competence in international law.

(3) Elections will be by absolute majority of the States parties: thus a nominee must obtain votes of 50 per cent plus one of the total number of States parties in order to be elected. Successive votes may have to be taken before that majority can be obtained.

(4) The 1993 draft provided a relatively long period of 12 years for the term of office of the judges. This was criticized by some States as too long, and has been reduced to nine years, the same term as judges of the International Court of Justice. By contrast the Commission reaffirmed its view that judges should not be eligible for re-election. The special nature of an international criminal jurisdiction militates in favour of that principle,

even on the basis of a nine-year term. However, it is necessary to provide limited exceptions to this principle to cope with transitional cases and casual vacancies (see arts. 6 (7) and 7 (2)).

(5) Some members believed that the distinction drawn by article 6 between persons with criminal trial experience and recognized competence in international law was too rigid and categorical. In their view it would be sufficient to require persons nominated for election to have either or both of those qualifications and to leave the issues of the balance of qualifications of the judges to the good sense of the States parties.

Article 7

Judicial vacancies

> 1. In the event of a vacancy, a replacement judge shall be elected in accordance with article 6.
>
> 2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term, and if that period is less than five years is eligible for re-election for a further term.

Commentary

(1) Vacancies in judicial office may be caused by death, by resignation or, in accordance with article 15, by loss of office. Replacement judges are to be elected in accordance with article 6 for the balance of their predecessor's term. If that term is less than five years measured from the day of taking up office, they are eligible for re-election.

(2) In accordance with article 6 (8), a replacement judge should have similar qualifications to the judge's predecessor. Thus, for example, a judge elected from nominees with criminal trial experience will be replaced by another such judge, in order to maintain the overall balance of the Court.

Article 8

The Presidency

> 1. The President, the first and second Vice-Presidents and two alternate Vice-Presidents shall be elected by an absolute majority of the judges. They shall serve for a term of three years or until the end of their term of office as judges, whichever is earlier.
>
> 2. The first or second Vice-President, as the case may be, may act in place of the President in the event that the President is unavailable or disqualified. An alternate Vice-President may act in place of either Vice-President as required.

3. The President and the Vice-Presidents shall constitute the Presidency which shall be responsible for:

(a) the due administration of the Court; and

(b) the other functions conferred on it by this Statute.

4. Unless otherwise indicated, pre-trial and other procedural functions conferred under this Statute on the Court may be exercised by the Presidency in any case where a chamber of the Court is not seized of the matter.

5. The Presidency may, in accordance with the Rules, delegate to one or more judges the exercise of a power vested in it under articles 26 (3), 27 (5), 28, 29 or 30 (3) in relation to a case, during the period before a Trial Chamber is established for that case.

Commentary

(1) The President and the two Vice-Presidents (with two alternates) have to perform important functions in the administration of the Court, in particular as members of the Presidency. They are elected for a term of three years, to coincide with new elections for one third of the judges. After each triennium the Presidency and the Appeals Chamber will be reconstituted: see article 8 (2). Alternates to the Vice-Presidents will also be elected to ensure that there are always three persons available to constitute the Presidency.

(2) Some members of the Commission argued strongly that the Court should have a full-time President, who would reside at the seat of the Court and be responsible under the Statute for its judicial functioning. Others stressed the need for flexibility, and the character of the Court as a body which would only be convened as necessary: in their view a requirement that the President serve on a full-time basis might unnecessarily restrict the range of candidates for the position. It was agreed that the provision would not prevent the President from becoming full time if circumstances should so require.

(3) In addition to its overall responsibility for administration, the Presidency has pre- and post-trial functions of a judicial character under the Statute. The manner in which these functions are exercised will be subject to more detailed regulation in the Rules.

(4) In the case of some of the pre-trial functions, the Presidency may delegate them to a judge or judges under paragraph 5. This raises the

question whether the involvement of any one judge in a case might prevent that judge sitting as a member of a Trial or Appeals Chamber, on the basis of an appearance of lack of impartiality.

(5) The European Court of Human Rights has had to face the problem on a number of occasions of whether prior involvement in a particular case disqualifies a judge from hearing the case under article 6 (1) of the European Convention of Human Rights and Fundamental Freedoms which entitled an accused to a hearing "by an impartial tribunal" (cf. art. 14 (1) of the International Covenant on Civil and Political Rights of 1966 (hereafter referred to as "ICCPR")). The European Court of Human Rights has held that "the mere fact that a judge has already taken decisions about the trial cannot in itself be regarded as justifying anxieties about his impartiality. What matters is the scope and nature of the measures taken by the judge ..." (Saraiva de Carvalho v. Portugal ECHR Ser. A vol. 286-B (1994) at para. 35; Nortier v. Netherlands ECHR Ser. A vol. 267 (1983), referring to the earlier cases). Thus a judge who had to determine on the basis of the file whether a case, including the prosecutor's charges, amounted to a prima facie case such as to justify making the accused go through the ordeal of a trial did not infringe article 6 (1) of the Convention by subsequently sitting at the trial, since the issues to be decided were not the same as those at the trial and there was no pre-judgment of guilt (ibid. at para. 37). Similarly with a decision to leave an accused in pre-trial detention, which was a decision not "capable of having a decisive influence on [the judge's] opinion of the merits" (ibid. at para. 38). The position is different where the judge is required to form a provisional view about the actual guilt of the accused: see Hauschildt v. Denmark Ser. A Vol. 154 (1989) ("particularly confirmed suspicion").

(6) In the exercise of its functions under the Statute and in particular of its power of delegation under paragraph 5, the Presidency will need to take these principles carefully into account. However, in the Commission's view the functions actually conferred by the Statute in the pre-trial phase are consistent with the involvement of members of the Presidency in Chambers subsequently dealing with that case. The one exception is the Indictment Chamber which may hear evidence in the absence of the accused. See the commentary to article 37 (5) below.

Article 9

Chambers

1. As soon as possible after each election of judges to the Court, the Presidency shall in accordance with the Rules constitute an Appeals Chamber consisting of the President and six other judges, of whom at least three shall be judges elected from among the persons nominated as having the qualification referred to in article 6 (1) (b). The President shall preside over the Appeals Chamber.

2. The Appeals Chamber shall be constituted for a term of three years. Members of the Appeals Chamber shall, however, continue to sit on the Chamber in order to complete any case the hearing of which has commenced.

3. Judges may be renewed as members of the Appeals Chamber for a second or subsequent term.

4. Judges not members of the Appeals Chamber shall be available to serve on Trial Chambers and other chambers required by this Statute, and to act as substitute members of the Appeals Chamber in the event that a member of that Chamber is unavailable or disqualified.

5. The Presidency shall nominate in accordance with the Rules five such judges to be members of the Trial Chamber for a given case. A Trial Chamber shall include at least three judges elected from among the persons nominated as having the qualification referred to in article 6 (1) (a).

6. The Rules may provide for alternate judges to be nominated to attend a trial and to act as members of the Trial Chamber in the event that a judge dies or becomes unavailable during the course of the trial.

7. No judge who is a national of a complainant State or of a State of which the accused is a national shall be a member of a chamber dealing with the case.

Commentary

(1) In order to allow for specialization, an Appeals Chamber is to be established, consisting of the President and six judges, at least three of whom are to be drawn from judges nominated as having recognized competence in international law. This ensures that a majority of judges with criminal trial experience will be available to serve on Trial Chambers. If the President is not available to preside over the Appeals Chamber, a Vice-President shall do so: see article 8 (2).

(2) A relatively strict separation of trial and appellate functions is envisaged. But for practical and logistic reasons that separation cannot be

complete. For example, the other judges may have to act as members of the Appeals Chamber if a member of that Chamber is unavailable or disqualified: see article 9 (4).

(3) In long trials, problems can arise if one or more members of the Court become unavailable (e.g. through ill-health). Paragraph 6 allows for alternate judges to be nominated to attend a trial and to replace judges who become unavailable. The purpose of alternate judges is to ensure that five judges should be available at the end of a trial to decide on the case and the sentence. In particular, it is important to avoid the possibility of a divided Chamber of four judges, leading to the possibility of a retrial: cf. article 45 (3).

(4) It was agreed that the importance of maintaining impartiality dictated that a judge having the nationality of a complainant State or of the State of which the accused is a national should not be a member of a chamber dealing with that case: see paragraph 7.

(5) The modalities of constituting a Trial Chamber will be laid down in the Rules. As to their content on this point, some members believed that it would be appropriate for the Presidency to appoint the judges who would serve in a Chamber. Others believed that the membership of the Chambers should be predetermined on an annual basis and should follow the principle of rotation to ensure that all judges have the opportunity to participate in the work of the Court. On balance the Commission thought this was a matter which could be left to the Rules, taking into account experience in the working of the Statute. It was noted that a number of Trial Chambers could be constituted at a given time, although due to the limited number of judges available it would only be possible for two trial Chambers actually to sit at the same time.

Article 10

Independence of the judges

1. In performing their functions, the judges shall be independent.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. In particular, they shall not while holding the office of judge be a member of the legislative or executive branches of the Government of a State, or of a body responsible for the investigation or prosecution of crimes.

3. Any question as to the application of paragraph 2 shall be decided by the Presidency.

4. On the recommendation of the Presidency, the States parties may by a two-thirds majority decide that the work-load of the Court requires that the judges should serve on a full-time basis. In that case:

(a) existing judges who elect to serve on a full-time basis shall not hold any other office or employment; and

(b) judges subsequently elected shall not hold any other office or employment.

Commentary

(1) Article 10 states the basic rule of the independence of the judges. In drafting it, the Commission took into account the requirement that judicial independence be effectively ensured and also the fact that the Court will not - or not at first - be a full-time body. Thus, in accordance with article 17, judges are not paid a salary but a daily allowance for each day in which they perform their functions. Article 10, without ruling out the possibility that the judge may perform other salaried functions (as also contemplated in art. 17 (3)), endeavours to define the activities which might compromise the independence of the judges and which are accordingly precluded.

(2) For instance, it was clearly understood that a judge could not be, at the same time, a member of the legislative or executive branch of a national government. The reference to the executive branch is not intended to cover persons who do not perform ordinary executive functions of government but have an independent role or office. Similarly, a judge should not at the same time be engaged in the investigation or prosecution of crime at the national level. On the other hand, national judges with experience in presiding over criminal trials would be most appropriate persons to act as judges.

(3) Some members of the Commission would strongly prefer a permanent court, believing that only permanence will give full assurance of independence and impartiality. Other members accept that the workload of the Court might become such that full-time judges will be required. In such a case, paragraph 4 provides that, on the recommendation of the Presidency, the States parties by a two-thirds majority may decide that the judges should serve on a full-time basis. In that case, existing judges may elect to serve on a full-time basis. Judges subsequently elected will necessarily do so. In such cases, judges must not hold any other office or employment: see also article 17 (4).

Article 11

Excusing and disqualification of judges

1. The Presidency at the request of a judge may excuse that judge from the exercise of a function under this Statute.

2. Judges shall not participate in any case in which they have previously been involved in any capacity or in which their impartiality might reasonably be doubted on any ground, including an actual, apparent or potential conflict of interest.

3. The Prosecutor or the accused may request the disqualification of a judge under paragraph 2.

4. Any question as to the disqualification of a judge shall be decided by an absolute majority of the members of the Chamber concerned. The challenged judge shall not take part in the decision.

Commentary

(1) The Presidency may, at the request of any judge, excuse that judge from the exercise of a function under this Statute and may do so without giving any reason. Judges have a general obligation to be available to sit on the Court (see art. 6 (2)), but circumstances might arise where it is necessary for good reason to excuse a judge from sitting and where the interests of justice will not be served by disclosing the reason. This might be so in the case of grave security risks to the person or family of a judge. These matters are left to the good sense of the Presidency and the judge concerned.

(2) In addition, a judge who has previously been involved in a case in any capacity or whose impartiality might reasonably be doubted is disqualified from sitting. The words "in any case in which they have previously been involved in any capacity" are intended to cover, for example, the judge's participation in the same case as prosecutor or defence lawyer. An issue of disqualification may be raised by the Prosecutor or the accused. The decision rests with the Chamber concerned.

Article 12

The Procuracy

1. The Procuracy is an independent organ of the Court responsible for the investigation of complaints brought in accordance with this Statute and for the conduct of prosecutions. A member of the Procuracy shall not seek or act on instructions from any external source.

2. The Procuracy shall be headed by the Prosecutor, assisted by one or more Deputy Prosecutors, who may act in place of the Prosecutor in

the event that the Prosecutor is unavailable. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. The Prosecutor may appoint such other qualified staff as may be required.

3. The Prosecutor and Deputy Prosecutors shall be persons of high moral character and have high competence and experience in the prosecution of criminal cases. They shall be elected by secret ballot by an absolute majority of the States parties, from among candidates nominated by States parties. Unless a shorter term is otherwise decided on at the time of their election, they shall hold office for a term of five years and are eligible for re-election.

4. The States parties may elect the Prosecutor and Deputy Prosecutors on the basis that they are willing to serve as required.

5. The Prosecutor and Deputy Prosecutors shall not act in relation to a complaint involving a person of their own nationality.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor at their request from acting in a particular case, and shall decide any question raised in a particular case as to the disqualification of the Prosecutor or a Deputy Prosecutor.

7. The staff of the Procuracy shall be subject to Staff Regulations drawn up by the Prosecutor.

Commentary

(1) Articles 12 and 13 deal with the two other organs which compose the international judicial system to be established.

(2) The Procuracy is an independent organ composed of the Prosecutor, one or more Deputy Prosecutors and such other qualified staff as may be required. The importance of the independence of the Procuracy is underlined by the provision that the election of the Prosecutor and Deputy Prosecutors be carried out not by the Court but by an absolute majority of the States parties. The Prosecutor must not seek or receive instructions from any Government or any other source.

(3) Paragraph 4 allows the Prosecutor or a Deputy Prosecutor to be elected on a stand-by basis, that is to say, that they would be available to act as may be required. Like article 10, it is intended to maintain the flexibility of the system of the Statute, while allowing for full-time involvement of the Prosecutor in case of need.

(4) As with the judges, the Prosecutor or Deputy Prosecutor cannot act as such in relation to a complaint involving a person of the same nationality.

(5) Paragraph 6 allows the Presidency to excuse the Prosecutor or a Deputy Prosecutor at their request from acting in a given case: in this

regard it parallels article 11 (1). It also provides for the Presidency to decide any issue that might arise as to the disqualification of the Prosecutor or a Deputy Prosecutor, whether under paragraph 5 or otherwise. Such cases are likely to be rare, since the Prosecutor acts in an essentially adversarial role and is not subject to the same requirement of independence as are the judges under article 10. Indeed, some members of the Commission thought that this provision was unnecessary and in conflict with the internal independence of the Procuracy from the judges. A majority of the Working Group, however, felt it should be retained to deal with any difficulties that might arise.

(6) An earlier version of this article provided for consultation with the Presidency in connection with the appointment by the Prosecutor of the staff of the Procuracy. This was deleted because the Commission felt that it might compromise or be seen to compromise the Prosecutor's independence.

Article 13

The Registry

1. On the proposal of the Presidency, the judges by an absolute majority by secret ballot shall elect a Registrar, who shall be the principal administrative officer of the Court. They may in the same manner elect a Deputy Registrar.

2. The Registrar shall hold office for a term of five years, is eligible for re-election and shall be available on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided on, and may be elected on the basis that the Deputy Registrar is willing to serve as required.

3. The Presidency may appoint or authorize the Registrar to appoint such other staff of the Registry as may be necessary.

4. The staff of the Registry shall be subject to Staff Regulations drawn up by the Registrar.

Commentary

(1) The Registrar, who is elected by the Court, is the principal administrative officer of the Court and is eligible for re-election. The Registrar has important functions under the Statute as a depositary of notifications and a channel for communications with States. A Deputy Registrar may also be elected if required.

(2) Article 13 regulates not only the election of the Registrar but also the appointment of the Registry staff and the rules which apply to the latter. As with article 12, financial arrangements for the employment of staff will have to be made in connection with the adoption of the Statute.

Article 14

Solemn undertaking

> Before first exercising their functions under this Statute, judges and other officers of the Court shall make a public and solemn undertaking to do so impartially and conscientiously.

Commentary

This undertaking is to be made by the judges but also by the other officers of the Court, that is to say, the Prosecutor and Deputy Prosecutors, the Registrar and the Deputy Registrar.

Article 15

Loss of office

> 1. A judge, the Prosecutor or other officer of the Court who is found to have committed misconduct or a serious breach of this Statute, or to be unable to exercise the functions required by this Statute because of long-term illness or disability, shall cease to hold office.
>
> 2. A decision as to the loss of office under paragraph 1 shall be made by secret ballot:
>
> (a) in the case of the Prosecutor or a Deputy Prosecutor, by an absolute majority of the States parties;
>
> (b) in any other case, by a two-thirds majority of the judges.
>
> 3. The judge, the Prosecutor or any other officer whose conduct or fitness for office is impugned shall have full opportunity to present evidence and to make submissions but shall not otherwise participate in the discussion of the question.

Commentary

(1) Article 15 deals both with loss of office by reason of misconduct or serious breach of the Statute and by reason of illness or disability. It applies equally to the judges and other officers. In the case of the Prosecutor or a Deputy Prosecutor, removal is a matter for a majority of States parties, again emphasizing the importance attached to the independence of the Procuracy.

(2) It is envisaged that procedures ensuring due process to the judge or officer in question should be established in the Rules, subject to paragraph 3.

(3) Some members observed that this provision differed from the corresponding article of the Statute of the International Court of Justice (art. 18) which required the unanimous opinion of the other members of the Court that the judge had ceased to fulfil the necessary conditions. The prevailing view was that a two-thirds majority was a sufficient guarantee, and that a requirement of unanimity was too stringent.

Article 16

Privileges and immunities

> 1. The judges, the Prosecutor, the Deputy Prosecutors and the staff of the Procuracy, the Registrar and the Deputy Registrar shall enjoy the privileges, immunities and facilities of a diplomatic agent within the meaning of the Vienna Convention on Diplomatic Relations of 16 April 1961.
>
> 2. The staff of the Registry shall enjoy the privileges, immunities and facilities necessary to the performance of their functions.
>
> 3. Counsel, experts and witnesses before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.
>
> 4. The judges may by an absolute majority decide to revoke a privilege or waive an immunity conferred by this article, other than an immunity of a judge, the Prosecutor or Registrar as such. In the case of other officers and staff of the Procuracy or Registry, they may do so only on the recommendation of the Prosecutor or Registrar, as the case may be.

Commentary

(1) Article 16 refers to the privileges, immunities and facilities to be extended to judges, officers and staff of the Court as well as to counsel, experts and witnesses appearing before it. It may be compared with article 19 of the Statute of the International Court of Justice and article 30 of the Statute of the International Tribunal for the Former Yugoslavia. In the case of the judges, the Prosecutor, the Deputy Prosecutors and staff of the Procuracy, and the Registrar and Deputy Registrar, the need for free exercise of their functions is very great, and they are expressly given the privileges, immunities and facilities of a diplomatic agent. Reference is made here to

the Vienna Convention on Diplomatic Relations of 16 April 1961 as that Convention contains the most widely accepted and elaborated rules on the subject.

(2) The position of the Registry staff is governed by the principle of functional immunity. It can be expected that much of their work will be done at the seat of the Court. The issue of facilities there will need to be regulated in the agreement with the host State under article 3 (2).

(3) Counsel, experts and witnesses are given the same privileges, immunities and facilities as those accorded to counsel, experts and witnesses involved in proceedings before the International Court of Justice under article 42 (3) of the Statute of the International Court of Justice.

(4) There is provision for waiver of an immunity by the judges, but this does not apply to acts or omissions of a judge, the Prosecutor or Registrar as such, that is to say, while acting in the performance of their office. The Prosecutor and the Registrar must consent to any waiver affecting their respective staff.

Article 17

Allowances and expenses

1. The President shall receive an annual allowance.

2. The Vice-Presidents shall receive a special allowance for each day they exercise the functions of the President.

3. Subject to paragraph 4, the judges shall receive a daily allowance during the period in which they exercise their functions. They may continue to receive a salary payable in respect of another position occupied by them consistently with article 10.

4. If it is decided under article 10 (4) that judges shall thereafter serve on a full-time basis, existing judges who elect to serve on a full-time basis, and all judges subsequently elected, shall be paid a salary.

Commentary

(1) Article 17 reflects the fact that, while the Court will not be a full-time body, its President, as explained in the commentary to article 8, should be available on a day-to-day basis if required. Hence the distinction between the daily or special allowance proposed for the judges and the Vice-Presidents and the annual allowance proposed for the President.

(2) As noted in the commentary to article 10, it can subsequently be decided by States parties, having regard to its workload, that the Court should move to a full-time basis. Paragraph 4 provides for the payment of full-time salaries instead of an allowance in such cases.

Article 18

Working languages

The working languages of the Court shall be English and French.

Commentary

English and French are to be the working languages of the Court. But this is without prejudice to the possibility that a particular trial be conducted concurrently in the language of the accused and of the witnesses, together with the working languages: cf. article 41 (1) (f).

Article 19

Rules of the Court

1. Subject to paragraphs 2 and 3, the judges may by an absolute majority make rules for the functioning of the Court in accordance with this Statute, including rules regulating:

(a) the conduct of investigations;

(b) the procedure to be followed and the rules of evidence to be applied;

(c) any other matter which is necessary for the implementation of this Statute.

2. The initial Rules of the Court shall be drafted by the judges within six months of the first elections for the Court, and submitted to a conference of States parties for approval. The judges may decide that a rule subsequently made under paragraph 1 should also be submitted to a conference of States parties for approval.

3. In any case to which paragraph 2 does not apply, rules made under paragraph 1 shall be transmitted to States parties and may be confirmed by the Presidency unless, within six months after transmission, a majority of States parties have communicated in writing their objections.

4. A rule may provide for its provisional application in the period prior to its approval or confirmation. A rule not approved or confirmed shall lapse.

Commentary

(1) Article 19 refers to rules of the Court relating to pre-trial investigations as well as the conduct of the trial itself. It extends to matters concerning the respect of the rights of the accused, procedure, evidence, etc.

(2) In connection with paragraph 1 (b), one member of the Commission felt that the adoption of rules of evidence was too complex and might involve the enactment of substantive law. It should in principle not be part of the Court's competence. Other members believed that it would be cumbersome and inflexible to contain all the rules of procedure and evidence in the Statute itself, and that this was a matter which should be left to the judges, acting with the approval of the States parties.

(3) In order to involve States parties more closely in the formulation of the Rules, article 19 envisages that the first set of Rules will be drawn up by the judges but adopted by States parties themselves in conference. Thereafter, in order to preserve flexibility, the judges may initiate changes in the Rules but these must only have definitive effect if approved by States parties, either at a meeting of States parties or by a special procedure of notification under paragraph 3. It is envisaged that this special summary procedure would be used for minor amendments, in particular changes not raising issues of general principle. Pending their approval by the States parties under either procedure, the Rules could be given provisional effect.

(4) Some members of the Commission expressed concern at the prospect that rules might be provisionally applied to a given case, only to be subsequently disapproved by States parties. In their view, if the judges were not to be entrusted with the task of making rules without any requirement of subsequent approval, they should not be able to make rules having provisional effect. The idea of rules having provisional effect was particularly difficult to accept in penal matters. On the other hand the Commission felt that, although the power to give provisional effect to a rule should be exercised with care, there might be cases where it would be necessary, and that some flexibility should be available.

PART 3: JURISDICTION OF THE COURT

Development and structure of Part 3

(1) Part 3, dealing with jurisdiction, is central to the draft Statute. Read in conjunction with certain provisions in Parts 3 and 5 (in particular arts. 34, 35 and 37), it limits the range of cases which the Court may deal with, so as to restrict the operation of the Statute to the situations and purposes referred to in the preamble.

(2) Two basic ideas initially underlay the jurisdictional strategy envisaged for the Statute, and were expressed in the 1992 Working Group's Report. The first was that the Court should exercise jurisdiction over crimes of an international character defined by existing treaties, and that - as a corollary - the Statute itself would be primarily procedural and adjectival. The second was that the Statute should distinguish, as the Statute of the International Court of Justice does, between participation and support for the structure and operation of the Court on the one hand and acceptance of substantive jurisdiction in a particular case on the other. The process of acceptance would be a separate one (as under art. 36 of the Statute of the International Court of Justice).

(3) To a great extent these premises continue to be reflected in the draft articles. Thus a major strand of jurisdiction continues to be in relation to crimes defined by a list of treaties in force (see art. 20 (e)) and jurisdiction in respect of such crimes is essentially based on the consent of affected States (this is sometimes referred to as the principle of "ceded jurisdiction"): see below, commentary to article 21. But the two principles have undergone some modification and development.

(4) The first modification relates to crimes under general international law. The distinction between treaty crimes and crimes under general international law can be difficult to draw. The crime of genocide provides an important example: it cannot be doubted that genocide, as defined in the Genocide Convention, is a crime under general international law.

(5) In 1993 a majority concluded that crimes under general international law could not be entirely excluded from the draft Statute. Consequently the Court was given jurisdiction over such crimes generically. They were defined as crimes "under a norm of international law accepted and recognized by the

international community of States as a whole as being of such a fundamental character that its violation attracts the criminal responsibility of individuals". Jurisdiction was limited by requirements of acceptance by the States on whose territory the alleged crime was committed and on whose territory the suspect was present. But this provision met with considerable criticism in the Sixth Committee and in the comments of States, on the grounds that a mere reference to crimes under general international law was highly uncertain and that it would give excessive power to the proposed Court to deal with conduct on the basis that it constituted a crime under general international law.

(6) The Commission accepts that there is some point to these criticisms, and that in the context of a new and untried jurisdictional system, provisions of indeterminate reference should be avoided. It has therefore limited the Court's jurisdiction over crimes under general international law to a number of specified cases, without prejudice to the definition and content of such crimes for other purposes: see the commentary to article 20 (a) to (d).

(7) The second modification relates to the extent of any "inherent" jurisdiction ("compétence propre") of the Court. One case of a crime under general international law that merits inclusion is the crime of genocide, authoritatively defined in the Genocide Convention of 1948.

Article II of the Convention provides:

> "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group."

In the Commission's view, the prohibition of genocide is of such fundamental significance, and the occasions for legitimate doubt or dispute over whether a given situation amounts to genocide are so limited, that the Court ought, exceptionally, to have inherent jurisdiction over it by virtue solely of the States participating in the draft Statute, without any further requirement of consent or acceptance by any particular State. The draft Statute so provides. The case for considering such "inherent jurisdiction" is powerfully reinforced by the Genocide Convention itself, which does not confer jurisdiction over genocide on other States on an aut dedere aut judicare basis, but expressly contemplates its conferral on an international criminal court to be created (art. VI). The draft Statute can thus be seen as completing in this respect the scheme for the prevention and punishment of genocide begun in 1948 - and at a time when effective measures against those who commit genocide are called for.

(8) A number of other important changes are reflected in Part 3 of the draft Statute. The 1993 draft distinguished between two "strands" of jurisdiction in relation to treaty crimes: (a) jurisdiction over crimes of an international character (1993 draft Statute, art. 22) and (b) crimes under what were referred to as suppression conventions (1993 draft Statute, art. 26, para. 2). As the 1993 Report of the Working Group pointed out, a distinction could be drawn "between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law" (1993 draft Statute, art. 26, para. 5). Although the distinction reflects, grosso modo, a distinction between conduct specifically defined as a crime independently of any given system of national law and conduct which a treaty requires to be made criminally punishable under national law, it can be difficult to draw in the context of some of the treaties listed in the 1993 draft Statute, and its retention would add an additional level of complexity. For these reasons the distinction has been abandoned: see article 20 (e) and the list of treaty crimes in the Annex. This does not suggest that all of the crimes referred to in the Annex are of the same character, which is certainly not the case.

(9) But this has presented a further problem. Another characteristic of "suppression conventions" (e.g. the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988, which is by far the most important example of the category) is that they cover a wide range of conduct, much of which, taken in isolation in the context of a single prosecution for a breach, is not of any substantial international concern. If the Court's jurisdiction is to be appropriately limited, either the treaties in question would have to be excluded altogether

(which in the case of the 1988 Convention mentioned above would be undesirable) or other jurisdiction-limiting provisions need to be devised.

(10) The draft Statute as now adopted takes the second course. The Annex to the Statute lists multilateral treaties in force clearly defining as criminal specified conduct of international concern and extending the jurisdiction of States over such conduct. The Court's jurisdiction extends to certain crimes defined by those treaties, whether or not they are "suppression conventions" as earlier defined. At the same time, in addition to requiring acceptance of the Court's jurisdiction in respect of such crimes by relevant States, the Statute seeks to limit the exercise of the Court's jurisdiction by provisions giving effect to the policies set out in the preamble. Relevant provisions in this respect are:

- article 20 (e) (the Court has jurisdiction over the treaty crimes only in cases which "having regard to the conduct alleged, constitute exceptionally serious crimes of international concern"; it will be a preliminary question under art. 34 for the Court to determine whether this is so in any case);
- article 25 (a complaint must be lodged by a State which has accepted the Court's jurisdiction with respect to the crime);
- article 27 (the Presidency must determine whether the Court should deal with the matter having regard to art. 35);
- article 34 (jurisdictional challenges may be made by the accused or an interested State at an early stage);
- article 35 (the Court may be called on to decide whether, having regard to specific criteria related to the purposes of the Statute, a given case should be regarded as admissible).

(11) It is thus by the combination of a defined jurisdiction, clear requirements of acceptance of that jurisdiction and principled controls on the exercise of jurisdiction that the Statute seeks to ensure, in the words of the preamble, that the Court will be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective.

(12) This having been said, some members of the Commission expressed their dissatisfaction at the restrictive approach taken to the jurisdiction of the Court (other than in cases of genocide). In their view the various restrictions imposed on the Court, and in particular the restrictive

requirements of acceptance contained in article 21, were likely to frustrate its operation in many cases, and even to make the quest for an international criminal jurisdiction nugatory.

(13) By contrast, other members of the Commission thought that the Statute went too far in granting "inherent" jurisdiction even over genocide, and that in the present state of the international community, the Court's jurisdiction should be entirely consensual. This issue arose also with respect to article 23, as recounted in the commentary to that article.

(14) Suggestions were made that the Court should also have an advisory jurisdiction in matters of international criminal law, either on reference from United Nations organs or from individual States. The Commission has not made any provision for such a jurisdiction. The function of the Court is to try persons charged under the Statute for crimes covered by article 20, including crimes contrary to the treaties referred to in article 20 (e). In doing so it will necessarily have to interpret those treaties, but it does not seem appropriate to give it additional jurisdiction of an inter-State character under them. Many of the treaties have their own jurisdictional provisions, for example referring disputes over their interpretation or application to the International Court of Justice. There is no reason to displace this jurisdiction.

Article 20

Crimes within the jurisdiction of the Court

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) the crime of genocide;

(b) the crime of aggression;

(c) serious violations of the laws and customs applicable in armed conflict;

(d) crimes against humanity;

(e) crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.

Commentary

(1) Article 20 states exhaustively the crimes over which the Court has jurisdiction under the Statute. There are, in effect, two categories of such crimes, those under general international law (subparas. (a) to (d)) and those crimes under or pursuant to certain treaties (para. (e) and Annex). The distinction is of particular importance for the purposes of article 39, which contains the nullum crimen sine lege principle.

(2) This in no way suggests that the two categories are mutually exclusive; on the contrary, there is considerable overlap between them. The conditions for the existence and exercise of jurisdiction of the two categories are essentially the same (subject to the obvious requirement that the relevant treaty should be properly applicable to the accused, as to which see art. 39). The only exception is genocide, which is covered exclusively by subparagraph (a), and which, as already explained, is subject to its own jurisdictional regime under the Statute.

(3) For the reasons stated above, the Commission concluded that it should not confer jurisdiction by reference to the general category of crimes under international law, but should refer only to the specific crimes warranting inclusion under that category. It has included four such: genocide, aggression, serious violations of the laws and customs applicable in armed conflict and crimes against humanity. It was guided in the choice of these in particular by the fact that three of the four crimes are singled out in the Statute of the International Tribunal for the Former Yugoslavia as crimes under general international law falling within the jurisdiction of the Tribunal (see arts. 3-5 of that Statute). The position of aggression as a crime is different, not least because of the special responsibilities of the Security Council under Chapter VII of the Charter of the United Nations, but the Commission felt that it too should be included, subject to certain safeguards. The inclusion of these four crimes represented a common core of agreement in the Commission, and is without prejudice to the identification and application of the concept of crimes under general international law for other purposes.

(4) As noted in the introduction to Part 3, above, the Statute is primarily an adjectival and procedural instrument. It is not its function to define new crimes. Nor is it the function of the Statute authoritatively to codify crimes under general international law. With respect to certain of these crimes, this is the purpose of the Draft Code of Crimes against the Peace and

Security of Mankind, although the Draft Code is not intended to deal with all crimes under general international law. To do so would require a substantial legislative effort. Accordingly the Commission has listed the four crimes without further specification in paragraphs (a) to (d). The following commentary states the understanding of the Commission with respect to the four crimes, as a basis for the application of these paragraphs by the Court.

(5) The least problematic of these, without doubt, is genocide. It is clearly and authoritatively defined in the 1948 Convention which is widely ratified, and which envisages that cases of genocide may be referred to an international criminal court. For the reasons stated in the introduction to this Part, the Commission believes that, exceptionally, the Court should have inherent jurisdiction over the crime of genocide - that is to say, its jurisdiction should exist as between all States parties to the Statute, and it should be able to be triggered by a complaint brought by any State party to the Genocide Convention, as expressly envisaged in article VI of that Convention.

(6) The crime of aggression presents more difficulty in that there is no treaty definition comparable to genocide. General Assembly resolution 3314 (XXIX) of 14 December 1974 deals with aggression by States, not with the crimes of individuals, and is designed as a guide for the Security Council, not as a definition for judicial use. But, given the provisions of Article 2 (4) of the Charter of the United Nations, that resolution offers some guidance, and a court must, today, be in a better position to define the customary law crime of aggression than was the Nürnberg Tribunal in 1946. It would thus seem retrogressive to exclude individual criminal responsibility for aggression (in particular, acts directly associated with the waging of a war of aggression) 50 years after Nürnberg. On the other hand the difficulties of definition and application, combined with the Security Council's special responsibilities under Chapter VII of the Charter, mean that special provision should be made to ensure that prosecutions are brought for aggression only if the Security Council first determines that the State in question has committed aggression in circumstances involving the crime of aggression which is the subject of the charge (see art. 23 (2) and commentary).

(7) A number of members of the Commission took the view that not every single act of aggression was a crime under international law giving rise to the criminal responsibility of individuals. In their view the customary rule as

it had evolved since 1945 covered only the waging of a war of aggression. They relied in particular on article 6 (a) of the Charter of the International Military Tribunal of 1945 (the Nürnberg Charter). They also drew attention to the language of the Friendly Relations Declaration (General Assembly resolution 2625 (XXV) of 24 October 1970), Principle 1 of which states, inter alia: "A war of aggression constitutes a crime against the peace, for which there is responsibility under international law", and to the terms of article 5 (2) of General Assembly resolution 3314 (XXIX) of 14 December 1974, on the Definition of Aggression, which states that "A war of aggression is a crime against international peace. Aggression gives rise to international responsibility." In the view of these members, the language of these resolutions had to be taken into account notwithstanding doubts about whether they dealt with inter-State law or with the criminal responsibility of individuals.

(8) Article 20 (c) refers to serious violations of the laws and customs applicable in armed conflict. This reflects provisions both in the Statute of the International Tribunal for the Former Yugoslavia and in the Draft Code of Crimes against the Peace and Security of Mankind as adopted at first reading. Article 2 of the Statute of the International Tribunal for the Former Yugoslavia covers grave breaches of the Geneva Conventions of 1949, which were and remain in force on the territory of the former Yugoslavia. But in addition article 3 deals with "violations of the laws or customs of war". It provides as follows:

> "Violations of the laws or customs of war
>
> The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
>
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
>
> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
>
> (e) plunder of public or private property."

(9) This may be compared with the relevant provision of the Draft Code of Crimes against the Peace and Security of Mankind. Article 22 of the Draft Code provides as follows:

> "Exceptionally serious war crimes
>
> 1. An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced [to ...].
>
> 2. For the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts:
>
> (a) acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [, in particular wilful killing, torture, mutilation, biological experiments, taking of hostages, compelling a protected person to serve in the forces of a hostile Power, unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities, deportation or transfer of the civilian population and collective punishment];
>
> (b) establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;
>
> (c) use of unlawful weapons;
>
> (d) employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;
>
> (e) large-scale destruction of civilian property;
>
> (f) wilful attacks on property of exceptional religious, historical or cultural value."

(10) The Commission shares the widespread view that there exists the category of war crimes under customary international law. That category overlaps with but is not identical to the category of grave breaches of the 1949 Geneva Conventions and Additional Protocol I of 1977. Modern usage prefers to refer to the "rules applicable in armed conflict" rather than the "laws of war", given the uncertainties about the status of "war" since 1945 and the fact that in most armed conflicts even of an obvious international character there is no formal declaration of war. Reference is made here both to "the laws and customs" not only because the phrase is a hallowed one but also to emphasize its basis in customary (general) international law. On the other hand not all breaches of the laws of war will be of sufficient gravity to justify their

falling within the jurisdiction of the Court, and paragraph (c) is accordingly limited by the use of the phrase "serious violations". The term "serious violations" is used to avoid confusion with "grave breaches" which is a technical term in the 1949 Conventions and Additional Protocol I of 1977. It does not follow from the classification of conduct as a "grave breach" made in the 1949 Conventions and the 1977 Protocol that the conduct will also constitute a "serious violation" although of course it may do so.

(11) With respect to the fourth category, crimes against humanity, this is by contrast a term of art, responding to the position under general international law. But there are unresolved issues about the definition of the crime. The view was expressed that the concept of "crimes against humanity" gave rise to the difficult question of determining, at the present stage of development in international law, when such crimes - in the absence of an applicable treaty regime - were triable as international crimes.

(12) An initial formulation of crimes against humanity was provided in article 6 (c) of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945, although the Nürnberg Tribunal was very circumspect in applying it. The concept was taken up in subsequent texts and is now contained in article 5 of the Statute of the International Tribunal for the Former Yugoslavia, which reads as follows:

> "Crimes against humanity
>
> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (a) murder;
>
> (b) extermination;
>
> (c) enslavement;
>
> (d) deportation;
>
> (e) imprisonment;
>
> (f) torture;
>
> (g) rape;
>
> (h) persecutions on political, racial and religious grounds;
>
> (i) other inhumane acts."

(13) This formulation is to be compared with draft article 21 of the Draft Code of Crimes against the Peace and Security of Mankind, which is entitled "Systematic or mass violations of human rights", but which in substance covers the same field as article 5 of the Yugoslav Tribunal Statute. It provides as follows:

> "An individual who commits or orders the commission of any of the following violations of human rights:
>
> - murder
> - torture
> - establishing or maintaining over persons a status of slavery, servitude or forced labour
> - persecution on social, political, racial, religious or cultural grounds
>
> in a systematic manner or on a mass scale; or
>
> - deportation or forcible transfer of population
>
> shall, on conviction thereof, be sentenced [to ...]."

(14) It is the understanding of the Commission that the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or part. The hallmarks of such crimes lie in their large-scale and systematic nature. The particular forms of unlawful act (murder, enslavement, deportation, torture, rape, imprisonment etc.) are less crucial to the definition that the factors of scale and deliberate policy, as well as in their being targeted against the civilian population in whole or in part. This idea is sought to be reflected in the phrase "directed against any civilian population" in article 5 of the Yugoslav Tribunal Statute, but it is more explicitly brought out in article 21 of the Draft Code. The term "directed against any civilian population" should be taken to refer to acts committed as part of a widespread and systematic attack against a civilian population on national, political, ethnic, racial or religious grounds. The particular acts referred to in the definition are acts deliberately committed as part of such an attack.

(15) Some members of the Commission doubted the wisdom of including in article 20 crimes under general international law. In their view, the primary purpose of the draft Statute was the setting up of a court to try such crimes

as the parties to the Statute could agree were international crimes triable by such a court. The annex to the Statute, listed such international crimes as had already been defined or identified by multilateral treaties widely adhered to and which were sufficiently clear and precise for a criminal court to apply. States becoming parties to the Statute would agree that, subject to the preconditions in articles 21 and 22, such crimes could be referred to the Court. Two of the four crimes now listed in article 20 (genocide and serious violations of the laws and customs applicable in armed conflict) were defined in whole or substantial part in multilateral treaties and listing them again as crimes under general international law was unnecessary. Also such a listing raised the difficult question of the relationship between multilateral treaty norms and customary international law. As to the two other crimes listed (aggression and crimes against humanity), serious questions as to their definition arose, which the Statute as a procedural and adjectival instrument could not address. Moreover, any listing of crimes under general international law raised questions as to why other international crimes, such as apartheid and terrorism, were not also included.

(16) These members of also argued that, if any crimes under general international law were to be included in the jurisdiction of the Court, the crime of apartheid should be among them. They pointed to the widespread ratification of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973, to the even more widespread condemnation of the practice of apartheid as a crime, and to the need to guard against further outbreaks of the crime whether in southern Africa or elsewhere. Other members of the Commission pointed out that apartheid was included in the list of treaty crimes in paragraph (e) of article 20, that the reference in that Convention to apartheid "as practised in southern Africa" was now factually inaccurate, and that quite apart from the broad definition of the crime in the Convention, its status as a crime under international law remained a disputed issue. On balance the Commission agreed that in the present international circumstances and given the advent of majority rule in South Africa, it was sufficient to include the Apartheid Convention under paragraph (e) of article 20.

(17) In this context, it should be stressed again that article 20 (a)-(d) is not intended as an exhaustive list of crimes under general international law. It is limited to those crimes under general international law which the Commission believes should be within the jurisdiction of the Court at this

stage, whether by reason of their magnitude, the continuing reality of their occurrence or their inevitable international consequences.

(18) The remainder of the Court's jurisdiction relates to what may be termed treaty crimes, that is to say, crimes of international concern defined by treaties. In the interests of certainty the Commission believes that these treaties should be exhaustively enumerated, and this was done in article 22 of the 1993 draft Statute. The list of crimes defined by treaties, revised and with the addition of the few universal "suppression conventions", is contained in an Annex to the Statute. The criteria for inclusion in the Annex were, to summarize:

(a) that the crimes are themselves defined by the treaty so that an international criminal court could apply that treaty as law in relation to the crime, subject to the nullum crimen guarantee contained in article 39;

(b) that the treaty created either a system of universal jurisdiction based on the principle aut dedere aut judicare or the possibility for an international criminal court to try the crime, or both, thus recognizing clearly the principle of international concern.

(19) The Commentary to the Annex gives reasons for the inclusion or exclusion of particular treaties.

(20) In addition the Commission concluded that some further limitation was required over the Court's jurisdiction under the treaties in the Annex, on the ground that many of those treaties could cover conduct which, though serious in itself, was within the competence of national courts to deal with and which (in the context of an individual case) did not require elevation to the level of an international jurisdiction. This further limitation is achieved in paragraph (e), which requires that the crime in question, having regard to the conduct alleged, should have constituted an exceptionally serious crime of international concern.

(21) The importance of the systematic factor was stressed by a number of members of the Commission, in particular in the context of crimes associated with terrorist activity. As yet the international community has not developed a single definition of terrorism, although there are definitions of the term in some regional conventions. A systematic campaign of terror committed by some group against the civilian population would fall within the category of crimes under general international law in subparagraph (d), and if motivated on ethnic or racial grounds also subparagraph (a). In addition, of the 14 treaties listed in the Annex, six are specifically concerned with terrorist

offences of one kind or another (e.g. hijacking and hostage-taking). Thus, as a number of members of the Commission stressed, terrorism, when systematic and sustained, is a crime of international concern covered by one or other of the crimes referred to in article 20. In addition, they noted that terrorism practised in any form is universally accepted to be a criminal act.

(22) In many cases terrorist activity is supported by large-scale drug-trafficking, which is of undeniable international concern. In such cases, as with those referred to in the previous paragraph, the requirements of subparagraph (e) in terms of the exceptionally serious character of the crime will readily be satisfied.

(23) As is pointed out above, the Annex includes only treaties in force defining crimes of an international character and establishing a broad jurisdictional basis to trial of such crimes. It does not include a number of relevant instruments in the course of development: in particular, the draft Code of Crimes against the Peace and Security of Mankind, and the proposed instrument being elaborated within the framework of the General Assembly on the protection of peace-keepers. As to the Draft Code of Crimes, a number of members of the Commission reaffirmed their view that the Draft Code was an essential complement to the draft Statute and their hope that the two instruments would come to be linked in their operation.

Article 21

Preconditions to the exercise of jurisdiction

1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20 if:

(a) in a case of genocide, a complaint is brought under article 25 (1);

(b) in any other case, a complaint is brought under article 25 (2) and the jurisdiction of the Court with respect to the crime is accepted under article 22:

(i) by the State which has custody of the suspect with respect to the crime ("the custodial State"); and

(ii) by the State on the territory of which the act or omission in question occurred.

2. If, with respect to a crime to which paragraph 1 (b) applies, the custodial State has received, under an international agreement, a request from another State to surrender a suspect for the purposes of

prosecution, then, unless the request is rejected, the acceptance by the requesting State of the Court's jurisdiction with respect to the crime is also required.

Commentary

(1) Article 21 spells out the States which have to accept the Court's jurisdiction with regard to a crime referred to in article 20 for the Court to have jurisdiction. The modes of acceptance are spelt out in article 22.

(2) The general criterion recommended by the Commission is that contained in article 21 (1) (b). Acceptance is required by any State which has custody of the accused in respect of the crime (which it might have either because it has jurisdiction over the crime or because it has received an extradition request relating to it), and by the State on whose territory the crime was committed. This paragraph should be read in conjunction with article 53 on surrender of an accused to the Court, in particular paragraph 2, and against the background of the strong presumption under article 37 that the Court will have the accused before it when it tries a case.

(3) Article 21 differs from the equivalent provision of the 1993 draft Statute (viz. art. 24) in a number of respects. First, it treats genocide separately: see paragraph 6 below. Secondly, it focuses in paragraph 1 (b) specifically on the custodial State in respect of the accused, as distinct from any State having jurisdiction under the relevant treaty. Thirdly, that subparagraph requires acceptance by the State on whose territory the crime was committed, thus applying to all crimes, other than genocide, the acceptance requirement in the 1993 draft Statute for crimes under general international law. Fourthly, it also requires in such cases the acceptance of a State which has already established, or eventually establishes, its right to the extradition of the accused pursuant to an extradition request: see paragraph 2.

(4) The term "custodial State" is intended to cover a range of situations, for example, where a State has detained or detains a person who is under investigation for a crime, or has that person in its control. The term would include a State which had arrested the suspect for a crime, either pursuant to its own law or in response to a request for extradition. But it would also extend, for example, to a State the armed forces of which are visiting another State and which has detained under its system of military law a member of the force who is suspected of a crime: in such a case the State to which the force belongs, rather than the host State, would be the "custodial State".

(If the crime in question was committed on the territory of the host State, the acceptance of that State would, of course, also be necessary under subparagraph (b) (ii) for the Court to have jurisdiction.)

(5) Another important feature of the Statute is article 54, which imposes on a State party whose acceptance of the Court's jurisdiction is required, but which does not accept the jurisdiction, an aut dedere aut judicare obligation, equivalent to the obligation included in most of the treaties listed in the Annex. As between parties to the Statute this in effect integrates the International Criminal Court into the existing system of international criminal jurisdiction and cooperation in respect of treaty crimes: see below, article 54 and commentary.

(6) Several members of the Commission would have preferred article 21 (1) (b) to have required acceptance by the State of the accused's nationality, as well as or instead of the State on whose territory the crime was committed. In their view the location of the crime could be fortuitous and might even be difficult to determine, whereas nationality represented a determinate and significant link for the purposes of allegiance and jurisdiction. Some would also have preferred an express requirement for consent by the State which was also the victim of the act in question: see also the commentary to article 23, paragraph (9).

(7) In light of the decision to confer "inherent" jurisdiction over genocide, article 21 treats that crime separately. Genocide is a crime under international law defined by the Genocide Convention (United Nations, Treaty Series, vol. 78, p. 277). Unlike the treaties listed in the Annex, the Genocide Convention is not based on the principle aut dedere aut judicare, but on the principle of territoriality. Article VI provides that persons charged with genocide or any of the other acts enumerated in the Convention shall be tried by a competent court of the State in which the act was committed. However, as a counterpart to the non-inclusion of the principle of universality in the Convention, article VI also provides for the trial of persons by "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction". This can be read as an authority by States parties to the Convention which are also parties to the Statute to allow the Court to exercise jurisdiction over an accused who has been transferred to the Court by any State. The travaux of article VI support that interpretation. (See Report of the Ad Hoc Committee on Genocide, 5 April - 10 May 1948

(ECOSOC Official Record third year, seventh session, Supp. No. 6 (E/794, 1948, pp. 11-12)). For the reasons already given, the Commission concluded that the Court should have inherent jurisdiction over the crime of genocide, on a complaint being made by a party to the Genocide Convention, and the Statute so provides: see paragraph 1 (a), and see also articles 25 (1), 51 (3) (a) and 53 (2) (a) (i).

Article 22

Acceptance of the jurisdiction of the Court for the purposes of article 21

1. A State party to this Statute may:

(a) at the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or

(b) at a later time, by declaration lodged with the Registrar;

accept the jurisdiction of the Court with respect to such of the crimes referred to in article 20 as it specifies in the declaration.

2. A declaration may be of general application, or may be limited to particular conduct or to conduct committed during a particular period of time.

3. A declaration may be made for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case it may be withdrawn only upon giving six months' notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.

4. If under article 21 the acceptance of a State which is not a party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the Court exercising jurisdiction with respect to the crime.

Commentary

(1) Article 21 identifies the States whose acceptance of the jurisdiction is required before the Court entertains a case. Article 22 is concerned with the modalities of that acceptance, and is drafted so as to facilitate acceptance both of the Statute as a whole and of the Court's jurisdiction in individual cases.

(2) The system adopted can be characterized as an "opting-in" system, whereby jurisdiction over certain crimes is not conferred automatically on the Court by the sole fact of becoming a party to the Statute but, in addition, by way of a special declaration, which can be made at the time of becoming a party to

the Statute or subsequently. The Commission believed that this best reflected the considerations set out in the preamble, as well as its general approach to the Court's jurisdiction.

(3) In its 1993 Report, the Working Group had proposed two alternatives to this article, based on the idea of "opting out" rather than "opting in" to the jurisdiction. On balance, the Commission considers that the "opting in" approach is the right one. Any other approach could prevent the Court hearing a case, even though all States concerned are willing that it should do so. The reason is that it may not be clear, until after a complaint is brought, which specific States are required by article 21 to have accepted the jurisdiction of the Court. If an opting-out regime were to be preferred, its effect would be to prevent a State from accepting jurisdiction in respect of a complaint which had already been brought. This would be undesirable. No doubt it would be possible to add to an initial "opting-out" provision a further capacity to opt back in, but this would be an artificial and complex system, and would, in practice, in the Commission's view add nothing in substance to article 22 as drafted.

(4) Consistently with this approach, paragraphs 1 to 3 deal with acceptance by State parties to the Statute. Paragraph 1 provides for the possibility of a general declaration along the lines of the optional clause contained in article 36 of the Statute of the International Court of Justice. Such a declaration may be general or subject to limitations ratione materiae or ratione temporis, and may be made for a limited period. It may be given in relation to a single case.

(5) In respect of the Court's "inherent" jurisdiction over genocide (as to which see the commentary to art. 20, para. (7)), acceptance of jurisdiction under article 22 will not be necessary. However, it is possible to envisage cases where the States concerned are not parties to the Genocide Convention but none the less wish the Court to exercise jurisdiction over such a crime. The general reference in paragraph 1 to "the crimes referred to in article 20" is intended to cover such an exceptional case: see also articles 21 (1) (b) and 25 (2), which are worded accordingly.

(6) Paragraph 4 deals with the acceptance of the Court's jurisdiction by States which are not parties to the Statute. This should be possible, consistently with the general approach to the Court's jurisdiction outlined in the preamble. On the other hand a State non-party should not be required - or for that matter permitted - to do more than consent to the exercise of

jurisdiction in a given case by declaration lodged with the Registrar. If it wishes to take advantage of the existence of the Court to accept its jurisdiction over crimes, bring complaints, etc., such a State should become a party to the Statute. For judicial cooperation with States not parties see article 56.

(7) A number of members of the Commission would, however, prefer a system which would actively encourage States to accept the jurisdiction of the Court in advance of any particular crime being committed. They accordingly favour a system of opting-out, so that States on becoming parties to the Statute would have to publicly declare that they did not accept jurisdiction over specified crimes.

(8) One member of the Commission would go further, expressing profound reserve at a system of acceptance of jurisdiction which would in his view empty the Statute of real content so far as the jurisdiction of the Court is concerned. This prevented the member from joining the consensus of the Commission on the system of the draft Statute.

(9) When States conclude a treaty by which they accept the jurisdiction of the Court in relation to crimes listed in article 20, they are free to deposit that treaty with the Registrar, and this will constitute a sufficient declaration for the purposes of this article, provided that it is clear that all the parties to the treaty have consented to the deposit. Some members of the Commission would have preferred to make this clear beyond doubt by adding a paragraph specifically dealing with reference of crimes to the Court by treaty.

Article 23

Action by the Security Council

1. Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations.

2. A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.

3. No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.

Commentary

(1) Paragraph 1 of article 23 does not constitute a separate strand of jurisdiction from the point of view of the kind of crimes which the Court may deal with (jurisdiction ratione materiae). Rather, it allows the Security Council to initiate recourse to the Court by dispensing with the requirement of the acceptance by a State of the Court's jurisdiction under article 21, and of the lodging of a complaint under article 25. This power may be exercised for example, in circumstances where Security Council might have authority to establish an ad hoc tribunal under Chapter VII of the Charter of the United Nations. The Commission felt that such a provision was necessary in order to enable the Security Council to make use of the Court, as an alternative to establishing ad hoc tribunals and as a response to crimes which affront the conscience of mankind. On the other hand it did not intend in any way to add to or increase the powers of the Council as defined in the Charter, as distinct from making available to it the jurisdiction mechanism created by the Statute.

(2) The Commission understood that the Security Council would not normally refer to the Court a "case" in the sense of an allegation against named individuals. Article 23 (1) envisages that the Security Council would refer to the Court a "matter", that is to say, a situation to which Chapter VII of the Charter applies. It would then be the responsibility of the Prosecutor to determine which individuals should be charged with crimes referred to in article 20 in relation to that matter: see article 25 (4).

(3) Some members of the Commission expressed concern at the possibility of the Security Council referring a particular case to the Court in any circumstances at all. Quite apart from the question of the extent of the powers of the Security Council under Chapter VII (as to which see para. (6) below), they were concerned that article 23 (1) might be read as endorsing detailed involvement by the Security Council in the prosecution of individuals for crimes, something which in their view should never be a matter for the Council.

(4) Concern was also expressed by some members of the Commission at the linkage between the Security Council as a principal organ of the United Nations and a treaty body established by a certain number of States.

On the other hand it was pointed out that institutional links existed between the United Nations and a number of other such bodies (e.g. the Human Rights Committee under the ICCPR), and that, in any event, the Statute should require the participation of a significant proportion of States before coming into force.

(5) Some members were of the view that the power to refer cases to the Court under article 23 (1) should also be conferred on the General Assembly, particularly in cases in which the Council might be hampered in its actions by the veto. On further consideration, however, it was felt that such a provision should not be included as the General Assembly lacked authority under the Charter to affect directly the rights of States against their will, especially in respect of issues of criminal jurisdiction. The General Assembly would of course retain its power under the Charter to make recommendations with respect to matters falling within the jurisdiction of the Court, and, depending on the terms of any relationship agreement under article 2, will have a significant role in the operation of the Statute.

(6) In adopting article 23 (1) the Commission is not to be understood as taking any position as to the extent of the powers of the Security Council under Chapter VII of the Charter or otherwise, or as to the situations in which it is proper that these powers should be exercised. Different views were expressed on these issues during the debate in the Commission.

(7) The financial arrangements for the Court will depend on the relationship to be established between the Court and the United Nations, an issue discussed in the Commentary to article 2. If the costs of proceedings under the Statute are to be met by States parties rather than through the United Nations system, special provision will need to be made to cover the costs of trials pursuant to article 23 (1).

(8) Paragraph 2 of article 23 deals with the specific case of a charge of aggression. Any criminal responsibility of an individual for an act or crime of aggression necessarily presupposes that a State had been held to have committed aggression, and such a finding would be for the Security Council acting in accordance with Chapter VII of the Charter to make. The consequential issues of whether an individual could be indicted, for example, because that individual acted on behalf of the State in such a capacity as to have played a part in the planning and waging of the aggression, would be for the Court to decide.

(9) Although a Security Council determination of aggression is a necessary preliminary to a complaint being brought in respect of or directly related to the act of aggression, the normal provisions of the draft Statute with respect to acceptance of the jurisdiction and the bringing of a complaint apply, unless the Security Council also acts under article 23 (1) with respect to the aggression.

(10) One member of the Commission preferred that the jurisdiction of the Court over crimes referred to in article 20 (a) to (d) should be dependent in all cases on the prior authorization of the Security Council, given the inevitable implications for international peace and security inherent in such situations. The Commission did not support this suggestion, although it recognized that, in the case where the Security Council had already taken action under Chapter VII, issues of the relationship between that action and the Court's jurisdiction could arise, a matter dealt with in paragraph 3.

(11) Another member pointed out that in paragraphs 1 and 2 of article 23 the exercise of the competences pertaining to the Security Council in its relationship with the exercise of the competences pertaining to the Court was envisaged as a "preliminary question" ("cuestión prejudicial" in Spanish), as known in some legal systems. By way of example, paragraphs 2 and 3 of article 177 of the Treaty instituting the European Economic Community were mentioned.

(12) Paragraph 3 of article 23 prevents a prosecution from being commenced, except in accordance with a decision of the Security Council, in relation to a situation with respect to which Chapter VII action is actually being taken by the Council. It is an acknowledgement of the priority given by Article 12 of the Charter of the United Nations, as well as for the need for coordination between the Court and the Council in such cases. On the other hand it does not give the Council a mere "negative veto" over the commencement of prosecutions. It is necessary that the Council should be acting to maintain or restore international peace and security or in response to an act of aggression. Once the Chapter VII action is terminated the possibility of prosecutions being commenced under the Statute would revive.

(13) Several members of the Commission took the view that paragraph 3 was undesirable, on the basis that the processes of the Statute should not be prevented from operating through political decisions taken in other forums.

(14) More generally, the view was also expressed by certain members that, although it was clear that provisions of the United Nations Charter might be

paramount, it was unwise for the Commission to seek to provide in the Statute for situations in which Charter provisions, such as Chapter VII, ought to apply. United Nations Charter interpretation or application - in politically sensitive situations - was a complex and difficult responsibility to be undertaken only in light of prevalent United Nations practice. Moreover, defining the role of the Security Council with respect to the Statute was a matter for appropriate consultation, by appropriate representatives of the General Assembly with appropriate representatives of the Security Council.

(15) There was also the consideration that article 23 would introduce into the Statute a substantial inequality between States members of the Security Council and those that were not members, and, as well, between the permanent members of the Security Council and other States. It was not likely to encourage widest possible adherence of States to the Statute. Thus, the preferable course, in this view, was for article 23 not to be included in the Statute, but for a savings clause to be included as a preambular paragraph in the covering treaty, to which the Statute would be an annex, which would provide for the paramountcy of the Charter. Such a savings clause is found in the preamble to the 1974 General Assembly resolution 3314 (XXIX) on the Definition of Aggression which states that: "Nothing in the definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations".

Article 24

Duty of the Court as to jurisdiction

> The Court shall satisfy itself that it has jurisdiction in any case brought before it.

Commentary

This article is intended to spell out the duty of the Court (and of each of its organs, as appropriate) to satisfy itself that it has jurisdiction in a given case. Detailed provisions relating to challenges to jurisdiction are contained in article 34. But even in the absence of a challenge there is an ex officio responsibility on the Court in matters of jurisdiction.

PART 4. INVESTIGATION AND PROSECUTION

Article 25

Complaint

1. A State party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 may lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed.

2. A State party which accepts the jurisdiction of the Court under article 22 with respect to a crime may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.

3. As far as possible a complaint shall specify the circumstances of the alleged crime and the identity and whereabouts of any suspect, and be accompanied by such supporting documentation as is available to the complainant State.

4. In a case to which article 23 (1) applies, a complaint is not required for the initiation of an investigation.

Commentary

(1) The Court is envisaged as a facility available to States Parties to its Statute, and in certain cases to the Security Council. The complaint is the mechanism that invokes this facility and initiates the preliminary phase of the criminal procedure. Such a complaint may be filed by any State party which has accepted the jurisdiction of the Court with respect to the crime complained of. In the case of genocide, where the Court has jurisdiction without any additional requirement of acceptance, the complainant must be a Contracting Party to the Genocide Convention and thus entitled to rely on article VI of the Convention: see paragraph 1. In this context it may be recalled that any Member of the United Nations, and any other State invited to do so by the General Assembly, may become a Contracting Party to the Genocide Convention: see article XI of the Convention.

(2) On balance the Commission believes that resort to the Court by way of complaint should be limited to States parties. This may encourage States to accept the rights and obligations provided for in the Statute and to share in the financial burden relating to the operating costs of the Court. Moreover in practice the Court could only satisfactorily deal with a prosecution initiated by complaint if the complainant is cooperating with the Court under Part 7 of the Statute in relation to such matters as the provision of evidence, witnesses, etc.

(3) As noted above in relation to article 23, in cases where the Court has jurisdiction by virtue of a decision of the Security Council under Chapter VII of the Charter, the actual prosecution will be a matter for the Procuracy and there will be no requirement of a complaint: see article 25 (4). The Procuracy should have equal independence in relation to cases initiated under article 23 (1) as to those initiated by a complaint.

(4) One member of the Commission suggested that the Prosecutor should be authorized to initiate an investigation in the absence of a complaint if it appears that a crime apparently within the jurisdiction of the Court would otherwise not be duly investigated. However, other members felt that the investigation and prosecution of the crimes covered by the Statute should not be undertaken in the absence of the support of a State or the Security Council, at least not at the present stage of development of the international legal system.

(5) The complaint is intended to bring to the attention of the Court the apparent commission of a crime. The complaint must as far as possible be accompanied by supporting documentation: see paragraph 3. The Court is envisaged as a mechanism that should be available whenever necessary, but which should not be activated unless there is reason to do so. Given the personnel required for and the costs involved in a criminal prosecution, the jurisdiction should not be invoked on the basis of frivolous, groundless or politically motivated complaints. Moreover, the Prosecutor must have the necessary information to begin an investigation. This is not to suggest that the complaint must itself establish a prima facie case, but rather that it should include sufficient information and supporting documentation to demonstrate that a crime within the jurisdiction of the Court has apparently been committed, and to provide a starting point for the investigation.

Article 26

Investigation of alleged crimes

> 1. On receiving a complaint or upon notification of a decision of the Security Council referred to in article 23 (1), the Prosecutor shall initiate an investigation unless the prosecutor concludes that there is no possible basis for a prosecution under this Statute and decides not to initiate an investigation, in which case the Prosecutor shall so inform the Presidency.

2. The Prosecutor may:

(a) request the presence of and question suspects, victims and witnesses;

(b) collect documentary and other evidence;

(c) conduct on-site investigations;

(d) take necessary measures to ensure the confidentiality of information or the protection of any person;

(e) as appropriate, seek the cooperation of any State or of the United Nations.

3. The Presidency may, at the request of the Prosecutor, issue such subpoenas and warrants as may be required for the purposes of an investigation, including a warrant under article 28 (1) for the provisional arrest of a suspect.

4. If, upon investigation and having regard, inter alia, to the matters referred to in article 35, the Prosecutor concludes that there is no sufficient basis for a prosecution under this Statute and decides not to file an indictment, the Prosecutor shall so inform the Presidency giving details of the nature and basis of the complaint and of the reasons for not filing an indictment.

5. At the request of a complainant State or, in a case to which article 23 (1) applies, at the request of the Security Council, the Presidency shall review a decision of the Prosecutor not to initiate an investigation or not to file an indictment, and may request the Prosecutor to reconsider the decision.

6. A person suspected of a crime under this Statute shall:

(a) prior to being questioned, be informed that the person is a suspect and of the rights:

- (i) to remain silent, without such silence being a consideration in the determination of guilt or innocence; and
- (ii) to have the assistance of counsel of the suspect's choice or, if the suspect lacks the means to retain counsel, to have legal assistance assigned by the Court;

(b) not be compelled to testify or to confess guilt; and

(c) if questioned in a language other than a language the suspect understands and speaks, be provided with competent interpretation services and with a translation of any document on which the suspect is to be questioned.

Commentary

(1) The Prosecutor, upon receipt of a complaint, is responsible for the investigation and the prosecution of the alleged crime. The Procuracy will investigate a complaint unless the Prosecutor on an initial review of the complaint and supporting documentation concludes that there is no possible basis for such an investigation. In the latter case, the Presidency is to be informed: see also paragraph 5.

(2) In conducting the investigation, the Procuracy should have the power to question suspects, victims and witnesses, to collect evidence, to conduct on-site investigations, etc. The Prosecutor may seek the cooperation of any State and request the Court to issue orders to facilitate the investigation. During the investigation, the Prosecutor may request the Presidency to issue subpoenas and warrants, since a Chamber will not be convened until a later stage, when the investigation has produced sufficient information for an indictment and a decision has been made to proceed.

(3) Under some penal systems, a distinction is made between the phase of investigation of a complaint by the police ("poursuite") and the subsequent more formal phase of preparation of the prosecution under the control of an examining magistrate ("instruction"). Although this system offers a number of guarantees of the integrity of the prosecution process, it has not been adopted in the draft Statute, for a number of reasons. First, the Statute offers its own guarantees of the independence of the prosecution process and of the rights of the suspect. Secondly, it is envisaged that complaints will not be brought before the Court without preliminary investigation on the part of the complainant State, which may substitute for the process of initial inquiry an investigation to some degree. Thirdly, the intention of the Statute is to create a flexible structure which does not involve undue expense or the proliferation of offices.

(4) Questions of cooperation on the part of States with the execution of subpoenas and warrants are dealt with in Part 7 of the Statute. See especially articles 51, 52 and 53.

(5) At the investigation phase, a person who is suspected of having committed a crime may be questioned, but only after being informed of the following rights: the right not to be compelled to testify or to confess guilt; the right to remain silent without reflecting guilt or innocence; the right to have the assistance of counsel of the suspect's choice; the right to free

legal assistance if the suspect cannot afford a lawyer, and the right to interpretation during questioning, if necessary: cf. ICCPR, article 14.

(6) There is some overlap between the provisions concerning the rights of a suspect, a person believed to have committed a crime but not yet charged, and the rights of the accused, a person formally charged with the crime in the form of an indictment confirmed under article 27. However, the rights of the accused during the trial would have little meaning in the absence of respect for the rights of the suspect during the investigation, for example the right not to be compelled to confess to a crime. Thus, the Commission felt that it was important to include a separate provision to guarantee the rights of a person during the investigation phase, before the person has actually been charged with a crime. It is also necessary to distinguish between the rights of the suspect and the rights of the accused since the former are not as extensive as the latter. For example, the suspect does not have the right at this stage to examine witnesses or to be provided with the prosecution evidence. The rights which are guaranteed to the accused in these respects are contained in article 41 (1) (e) and (2).

(7) Following the investigation, the Prosecutor must assess the information obtained and decide whether or not there is a sufficient basis to proceed with a prosecution. If not, the Prosecutor must so inform the Presidency which may at the request of the complainant State or (in a case initiated by it) the Security Council, review a decision of the Prosecutor not to proceed with a prosecution. This reflects the view that there should be some possibility of judicial review of the Prosecutor's decision not to proceed with a case. On the other hand, for the Presidency to direct a prosecution would be inconsistent with the independence of the Prosecutor, and would raise practical difficulties given that responsibility for the conduct of the prosecution is a matter for the Prosecutor. Hence paragraph 5 provides that the Presidency may request the Prosecutor to reconsider the matter, but leaves the ultimate decision to the Prosecutor. This procedure applies equally in the case of a decision of the Prosecutor under paragraph 1 not to proceed with a prosecution.

(8) Some members of the Commission would prefer that the Presidency also have the power to annul a decision of the Prosecutor not to proceed to an investigation or not to file an indictment in cases where it is clear that the Prosecutor has made an error of law in making that decision. Respect is due to decisions of the Prosecutor on issues of fact and evidence but like all

other organs of the court the Prosecutor is bound by the Statute and the Presidency should, in this view, have the power to annul decisions shown to be contrary to law.

(9) The phrase "sufficient basis" in paragraph 4 is intended to cover a number of different situations where further action under the Statute would not be warranted: first, where there is no indication of a crime within the jurisdiction of the Court; second, where there is some indication of such a crime but the Prosecutor concludes that the evidence available is not strong enough to make a conviction likely; third, where there is prima facie evidence of a crime within the jurisdiction of the Court, but the Prosecutor is satisfied that the case would probably be inadmissible under article 35.

Article 27

Commencement of prosecution

1. If upon investigation the Prosecutor concludes that there is a prima facie case, the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged.

2. The Presidency shall examine the indictment and any supporting material and determine:

(a) whether a prima facie case exists with respect to a crime within the jurisdiction of the Court; and

(b) whether, having regard, inter alia, to the matters referred to in article 35, the case should on the information available be heard by the Court.

If so, it shall confirm the indictment and establish a trial chamber in accordance with article 9.

3. If, after any adjournment that may be necessary to allow additional material to be produced, the Presidency decides not to confirm the indictment, it shall so inform the complainant State or, in a case to which article 23 (1) applies, the Security Council.

4. The Presidency may at the request of the Prosecutor amend the indictment, in which case it shall make any necessary orders to ensure that the accused is notified of the amendment and has adequate time to prepare a defence.

5. The Presidency may make any further orders required for the conduct of the trial, including an order:

(a) determining the language or languages to be used during the trial;

(b) requiring the disclosure to the defence, within a sufficient time before the trial to enable the preparation of the defence, of documentary or other evidence available to the Prosecutor, whether or not the Prosecutor intends to rely on that evidence;

(c) providing for the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial;

(d) providing for the protection of the accused, victims and witnesses and of confidential information.

Commentary

(1) While the complaint is the document that initiates the investigation of an alleged crime, the indictment is the document on the basis of which a prosecution is commenced. If after investigation the Prosecutor concludes that there is a prima facie case against the suspect in respect of a crime within the Court's jurisdiction, and that it is desirable having regard to article 35 for the prosecution to be commenced, the Prosecutor is to prepare an indictment including a concise statement of the facts alleged and of the crime or crimes alleged to have been committed. A prima facie case for this purpose is understood to be a credible case which would (if not contradicted by the defence) be a sufficient basis to convict the accused on the charge.

(2) The Prosecutor then submits the indictment and any necessary supporting documentation to the Presidency, which reviews the indictment and decides whether there is indeed a prima facie case of crime alleged to have been committed by the person named, and whether, having regard to the matters referred to in article 35, the case is apparently one over which the Court should exercise jurisdiction. If the answer to both questions is in the affirmative, it should confirm the indictment and convene a Chamber, in accordance with article 9, to conduct the trial. It is at this point in time, when the indictment is affirmed by the Court, that the person is formally charged with the crime and a "suspect" becomes an "accused".

(3) Before deciding whether to confirm an indictment, the Presidency may wish to ask the Prosecutor to provide further information, and may suspend consideration of whether to confirm an indictment while it is being sought, provided that, having regard to article 9 (3) of the ICCPR, the procedure is not unnecessarily delayed. Delay may be a consideration especially where the accused is in custody: see articles 28 (2), 41 (1) (c). The procedure will take place in private, and without notification to the suspect. It will not require examination of witnesses as distinct from examination of the case file

presented by the Prosecutor, which should fully reflect the case as prepared at this stage of the proceedings: cf. the special procedure of an Indictment Chamber under article 37 (4).

(4) Although this form of review of the indictment is necessary in the interests of accountability and in order to ensure that the Court only exercises jurisdiction in circumstances provided for by the Statute, it must be emphasized that confirmation of the indictment is in no way to be seen as a pre-judgement by the Court as to the actual guilt or innocence of the accused. The confirmation occurs in the absence of and without notice to the accused, and without any assessment of the defence as it will be presented at the trial.

(5) In some legal systems, an indictment is a public document, unless for some special reason it is ordered to be "sealed". By contrast, under the Statute the Court will only publish an indictment at the beginning of the trial (see art. 38 (1) (a)), or as a result of a decision of an Indictment Chamber in the special circumstances envisaged by article 37 (4).

(6) At a later stage it may be necessary to amend an indictment, and the Court has power to do so on the recommendation of the Prosecutor under paragraph 4, ensuring at the same time that the accused is notified of the amendment and has any necessary additional time to prepare a defence. Such an amendment may involve changes in the particular allegations made, provided that they fall within the scope of the original complaint and of the jurisdiction of the Court. If the changes amount to a substantially different offence, a new indictment should be filed, and if the conditions laid down in the Statute for the Court's jurisdiction have materially altered, a new complaint may have to be lodged.

(7) Once the indictment has been affirmed, the Presidency may issue an arrest warrant (as to which see art. 28) and other orders required for the prosecution and conduct of the trial, including the particular orders referred to in paragraph 5. It is intended, however, that the Chamber should assume responsibility for subsequent pre-trial procedures once it is convened.

(8) If, after any necessary adjournment, the indictment is not confirmed, the procedure is at an end and the suspect, if in custody in relation to the complaint, would normally be entitled to be released. This is of course without prejudice to any other lawful basis for the detention of the suspect,

e.g. under national law. The complainant State and, in a case initiated by the Security Council under article 23 (1), the Council, should be informed of any decision not to confirm the indictment.

Article 28

Arrest

1. At any time after an investigation has been initiated, the Presidency may at the request of the Prosecutor issue a warrant for the provisional arrest of a suspect if:

(a) there is probable cause to believe that the suspect may have committed a crime within the jurisdiction of the Court; and

(b) the suspect may not be available to stand trial unless provisionally arrested.

2. A suspect who has been provisionally arrested is entitled to release from arrest if the indictment has not been confirmed within 90 days of the arrest, or such longer time as the Presidency may allow.

3. As soon as practicable after the confirmation of the indictment, the Prosecutor shall seek from the Presidency a warrant for the arrest and transfer of the accused. The Presidency shall issue such a warrant unless it is satisfied that:

(a) the accused will voluntarily appear for trial; or

(b) there are special circumstances making it unnecessary for the time being to issue the warrant.

4. A person arrested shall be informed at the time of arrest of the reasons for the arrest and shall be promptly informed of any charges.

Commentary

(1) Provisions dealing with the arrest and detention of an accused person are drafted so as to ensure compliance with relevant provisions of the ICCPR, especially article 9: see paragraphs 2 and 4, and articles 29 and 30.

(2) Prior to the confirmation of the indictment, the Presidency may order the arrest or detention of a suspect on the basis of a preliminary determination that there are sufficient grounds for doing so and a real risk that the suspect's presence at trial cannot otherwise be assured: see paragraph 1. This is referred to here as provisional arrest, following the language commonly used in extradition agreements and contained in General Assembly resolution 45/116 of 14 December 1990, Annex, Model Treaty on Extradition, article 9. In some legal systems it is referred to as provisional detention,

but for the purposes of the present Statute it is desirable to distinguish between the arrest of a person and that person's subsequent detention.

(3) Provisional arrest is intended as a rather exceptional remedy, since it would occur prior to any determination by the Court that the necessary conditions for the exercise of its jurisdiction appear to exist. By contrast, once the indictment has been confirmed, every effort should be taken to ensure that the accused is taken into custody so as to be available for trial. Normally the Presidency will grant a warrant for arrest of an accused unless it is clear that the accused will appear, or there are special circumstances (e.g. the fact that the accused is detained by a State party, or is serving a sentence for some other crime) making it unnecessary for the time being to issue the warrant.

(4) Article 28 deals only with the issue of a warrant of arrest. Judicial assistance on the part of States with respect to execution of warrants is dealt with in articles 52 and 53.

Article 29

Pre-trial detention or release

> 1. A person arrested shall be brought promptly before a judicial officer of the State where the arrest occurred. The judicial officer shall determine, in accordance with the procedures applicable in that State, that the warrant has been duly served and that the rights of the accused have been respected.
>
> 2. A person arrested may apply to the Presidency for release pending trial. The Presidency may release the person unconditionally or on bail if it is satisfied that the accused will appear at the trial.
>
> 3. A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of the arrest or detention. If the Presidency decides that the arrest or detention was unlawful, it shall order the release of the accused, and may award compensation.
>
> 4. A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held or if necessary, in the host State.

Commentary

(1) Article 29 deals with the issue of pre-trial detention or release on bail. It is drafted so as to ensure conformity with article 9 of the ICCPR. It requires that any person arrested pursuant to a warrant issued under article 28 should be brought promptly before a judicial officer of the State in which the arrest occurred, who should determine, in accordance with the

procedures applicable in that State, whether the warrant has been duly served and that the rights of the accused have been respected. The Commission acknowledges that there is some risk in entrusting these powers to a State official (usually a magistrate or some similar person exercising similar functions under national law) rather than before an organ of the Court. However, it is essential under article 9 (3) of the ICCPR that this preliminary opportunity for review of the arrest be provided promptly, and in practice this can only be done in this way. Since ex hypothesi the arresting State will be cooperating with the Court, there is no reason to expect that this preliminary procedure will cause difficulties.

(2) On the other hand, release whether unconditionally or on bail pending trial is a matter for the Presidency. In conformity with article 9 (4) of the ICCPR, it is provided that a person arrested pursuant to a warrant issued under article 28 may apply to the Court for a determination of the lawfulness under this Statute of the arrest or detention: see paragraph 3. The Court must decide whether the arrest and detention were lawful, and if not it shall order the release of the accused. In the case of wrongful arrest it may award compensation accordingly, as required by article 9 (5) of the ICCPR, which provides that "Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation". The Commission believes that the full range of guarantees to suspects and accused persons should be provided in the draft Statute. Issues of compensation to an accused unlawfully detained are of such a character, as compared with the different problem of the restitution of property rights of victims, as to which see the commentary to article 47.

(3) Article 9 (3) of the ICCPR provides that "it shall not be the general rule that persons awaiting trial shall be detained in custody", and this is the position under the Statute. On the other hand charges under the Statute are by definition brought only in the most serious cases, and it will usually be necessary to detain an accused who is not already in secure custody in a State. Article 9 (3) also provides that an accused "shall be entitled to trial within a reasonable time or to release". The right of an accused under the Statute to a prompt trial is contained in article 41 (1) (c). The Court should take this into account in exercising its powers under article 29. But having regard to the gravity of the offences concerned, the Commission decided against including specific time-limits within which a prosecution should be brought or the accused released.

(4) Unless released under article 29, a person arrested is to be held pending trial, either in an appropriate place of detention in the arresting State, in the State in which the trial is to be held, or, if necessary and as a last resort in the host State. Paragraph 4 is based on the assumption that detention will usually occur on the territory of the arresting State, but there may be good reasons (e.g. in terms of the secure detention of the accused, or even, the accused's physical safety) for another location.

Article 30

Notification of the indictment

1. The Prosecutor shall ensure that a person who has been arrested is personally served, as soon as possible after being taken into custody, with certified copies of the following documents, in a language understood by that person:

(a) in the case of a suspect provisionally arrested, a statement of the grounds for the arrest;

(b) in any other case, the confirmed indictment;

(c) a statement of the accused's rights under this Statute.

2. In any case to which paragraph (1) (a) applies, the indictment shall be served on the accused as soon as possible after it has been confirmed.

3. If, 60 days after the indictment has been confirmed, the accused is not in custody pursuant to a warrant issued under article 28 (3), or for some reason the requirements of paragraph 1 cannot be complied with, the Presidency may on the application of the Prosecutor prescribe some other manner of bringing the indictment to the attention of the accused.

Commentary

(1) As soon as an accused has been arrested on a warrant, the Prosecutor is required to take all necessary steps to notify the accused of the charge by serving the documents mentioned in paragraph 1. Subject to paragraph 3, discussed below, there is no obligation to inform a person of a charge prior to arrest, for the obvious reason that to do so may prompt the suspect to flee.

(2) The same principle applies to provisional arrest of a suspect, except that in this case a statement of the charges approved by the Presidency should be served, since the indictment may not yet exist and in any event will not have been confirmed. In the event the indictment is not confirmed the suspect

is entitled to be released, although again this would be without prejudice to any valid ground for arrest and detention that may otherwise exist.

(3) There is provision for some alternative form of notice if the accused is not under arrest 60 days after the issue of the warrant: see paragraph 3. This is most likely to occur as a precursor to a hearing before a Special Indictment Chamber under article 37 (4). Other forms of notice could make use of various forms of media, or in the case of persons in the control of a government, by communication to that government.

(4) As with article 28, article 30 deals only with the required notification by the Court. Issues of judicial assistance on the part of States are dealt with in Part 7. It is envisaged that the Rules will make provision for the due authentication of documents contained in requests under these articles.

Article 31

Persons made available to assist in a prosecution

> 1. The Prosecutor may request a State party to make persons available to assist in a prosecution in accordance with paragraph 2.
>
> 2. Such persons should be available for the duration of the prosecution, unless otherwise agreed. They shall serve at the direction of the Prosecutor, and shall not seek or receive instructions from any Government or source other than the Prosecutor in relation to their exercise of functions under this article.
>
> 3. The terms and conditions on which persons may be made available under this article shall be approved by the Presidency on the recommendation of the Prosecutor.

Commentary

(1) This article is intended to facilitate investigations and prosecutions by making qualified and experienced personnel available on request to the Prosecutor. States parties may, at the request of the Prosecutor, designate persons available to assist in the investigation or prosecution of a case, either a particular case or in general. Arrangements for the terms and conditions on which such persons will work should be approved in advance by the Presidency, which will have overall financial responsibility to the States parties for the operation of the Court. They may or may not involve the persons becoming temporary employees of the Procuracy: if they do, the staff Regulations referred to in article 12 (7) will apply.

(2) States should be prepared to make persons available for the duration of the prosecution. Any such persons would serve under the direction of the Prosecutor and would be prohibited from seeking or receiving instructions from their Government or any other source.

(3) At least in the initial stages of the establishment of the Court and subject to the provisions of the relationship agreement foreshadowed in article 2, consideration could be given to seconding personnel from the United Nations Secretariat to serve in the Procuracy.

(4) Some members of the Commission felt that despite the safeguards provided in paragraph 2, any system of secondment of State personnel to the Procuracy involved the danger of undermining the independence and impartiality of that organ, and could result in the Procuracy being little more than an extension of the prosecution power of a single State for the purposes of a given case. However expensive an international prosecution service might be, in their view it was essential to provide for such a service without possibility of dilution if the Statute was to operate with the necessary guarantee of integrity.

PART 5. THE TRIAL

Article 32

Place of trial

Unless otherwise decided by the Presidency, the place of the trial will be the seat of the Court.

Commentary

(1) Trials will normally take place at the seat of the Court. Alternatively, the Court may decide, in the light of the circumstances of a particular case, that it would be more practical to conduct the trial closer to the scene of the alleged crime, for example, so as to facilitate the attendance of witnesses and the production of evidence.

(2) Proximity of the trial to the place where the crime was allegedly committed may cast a shadow over the proceedings, raising questions concerning respect for the defendant's right to a fair and impartial trial or it may create unacceptable security risks for the defendant, the witnesses, the judges or the staff of the Court. Thus, trials may take place in a State other than the host State only when it is both practicable and consistent with

the interests of justice to do so. The Chamber may request the views of the Prosecutor or the defence on this question, without unnecessarily delaying the commencement of the trial.

(3) Trials taking place in States other than the host country would be conducted pursuant to an arrangement with the State concerned which may or may not be a State party to the Statute. This arrangement would need to address matters similar to those to be provided for the agreement with the host State under article 3, and possibly other matters if the trial is to be held in a State which is not a party to the Statute.

Article 33

Applicable law

The Court shall apply:

(a) this Statute;

(b) applicable treaties and the principles and rules of general international law; and

(c) to the extent applicable, any rule of national law.

Commentary

(1) In the draft Statute adopted in 1993, the Commission had placed this article in the Part dealing with jurisdiction. However, there is a distinction between jurisdiction and applicable law, and it seems appropriate to place the article in Part 5, dealing with the primary function of the Court, the exercise of jurisdiction through a Trial Chamber. But article 33 applies in relation to all actions taken by the Court at any stage.

(2) The first two sources of applicable law mentioned by the draft article are the Statute itself and applicable treaties. It is understood that, in cases of jurisdiction based on treaties under article 20 (e), the indictment will specify the charges brought against the accused by reference to the particular treaty provisions, which will, subject to the Statute, provide the legal basis for the charge. The principles and rules of general international law will also be applicable. The expression "principles and rules" of general international law includes general principles of law, so that the Court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or in international practice, whenever it needs guidance on matters not clearly regulated by treaty.

(3) The mention in the draft articles of rules of national law acquires special importance in the light of the inclusion in the Annex of treaties which explicitly envisage that the crimes to which the treaty refers are none the less crimes under national law. The dictates of the nullum crimen principle (as to which see art. 39) require that the Court be able to apply national law to the extent consistent with the Statute, applicable treaties and general international law. This is in any event desirable, as international law does not yet contain a complete statement of substantive criminal law. The Court will need to develop criteria for the application of rules of national criminal law, to the extent to which they are properly applicable to a given situation. In the event of a conflict between national and international law, the latter (including the nullum crimen principle, itself part of international law) will prevail.

(4) In relation to article 33, as in relation to article 20, several members of the Commission recalled the links to be established between the draft Statute and the Draft Code of Crimes against the Peace and Security of Mankind, and reaffirmed their view that the law to be applied by the Court should result from the Code.

(5) Certain members expressed substantial reservations about the possibility of the Court applying national law as such in cases brought before it. Although these members accepted that it would be necessary for the Court to refer to national law for various purposes, they thought that this would always be pursuant to a renvoi or authorization given by international law, including applicable treaties; in other cases, resort to the general principles of law would resolve any difficulties.

Article 34

Challenges to jurisdiction

Challenges to the jurisdiction of the Court may be made, in accordance with the Rules:

(a) prior to or at the commencement of the hearing, by an accused or any interested State; and

(b) at any later stage of the trial, by an accused.

Commentary

(1) This is, as explained in the introduction in Part 3 above, an important provision, which is intended to ensure that the Court adheres carefully to the

scope of jurisdiction defined by the Statute. The Court can be called on to exercise its powers under article 34 either by the accused or by any interested State. The term "interested State" is not defined but is intended to be interpreted broadly. For example a State which has lodged an extradition request with respect to an accused would be an "interested State" for this purpose, as also a State whose cooperation had been sought under Part 7 of the Statute.

(2) Challenges under article 34 may be made, in accordance with procedures laid down in the Rules, at any time after confirmation of an indictment up to the commencement of the hearing. In addition the accused may challenge the jurisdiction at any later stage of the trial, in which the Court would have the discretion to deal with the challenge as a separate issue or to reserve it to be decided as part of its judgement at the conclusion of the trial.

Article 35

Issues of admissibility

> The Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question:
>
> (a) has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;
>
> (b) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or
>
> (c) is not of such gravity to justify further action by the Court.

Commentary

(1) Article 35 allows the Court to decide, having regard to certain specified factors, whether a particular complaint is admissible and in this sense it goes to the exercise, as distinct from the existence, of jurisdiction. This provision responds to suggestions made by a number of States, in order to ensure that the Court only deals with cases in the circumstances outlined in the preamble, i.e. where it is really desirable to do so. Issues arising under article 35 should normally be dealt with as soon as possible after they are made. After the commencement of a trial they can only be dealt with on

the Court's own motion, on the basis that there will usually be no point in questioning then the exercise of a jurisdiction that has already begun to be exercised.

(2) The grounds for holding a case to be inadmissible are, in summary, that the crime in question has been or is being duly investigated by any appropriate national authorities or is not of sufficient gravity to justify further action by the Court. In deciding whether this is the case the Court is directed to have regard to the purposes of the Statute as set out in the preamble. Where more than one State has or may have jurisdiction over the crime in question, the Court may take into account the position of each such State.

(3) Some members of the Commission believed that it was not necessary to include article 35, as the relevant factors could be taken into account at the level of jurisdiction under articles 20, in particular 20 (e), and 21. Others pointed out that the circumstances of particular cases could vary widely and could anyway be substantially clarified after the Court assumed jurisdiction so that a power such as that contained in article 35 was necessary if the purposes indicated in the preamble were to be fulfilled.

Article 36

Procedure under articles 34 and 35

1. In proceedings under articles 34 and 35, the accused and the complainant State have the right to be heard.

2. Proceedings under articles 34 and 35 shall be decided by the Trial Chamber, unless it considers, having regard to the importance of the issues involved, that the matter should be referred to the Appeals Chamber.

Commentary

(1) Articles 34 and 35 must be read in conjunction with article 36, which lays down certain aspects of the procedure to be followed in the case of challenges under those provisions. More detailed aspects of the procedure will be laid down in the Rules.

(2) It is envisaged that as far as may be all challenges under articles 34 and 35 should be heard together as soon as possible. The aim should be to resolve the issue one way or the other by the commencement of the trial. Thus, if a State makes a challenge under articles 34 or 35, both the accused and the complainant State have a full right to be heard but should not

subsequently be allowed to relitigate the question. These questions are to be dealt with by the Trial Chamber, as provided in paragraph 2, subject to the possibility of referral of any case raising issues of general principle to the Appeals Chamber.

Article 37

Trial in the presence of the accused

1. As a general rule, the accused should be present during the trial.

2. The Trial Chamber may order that the trial proceed in the absence of the accused if:

(a) the accused is in custody, or has been released pending trial, and for reasons of security or the ill-health of the accused it is undesirable for the accused to be present;

(b) the accused is continuing to disrupt the trial; or

(c) the accused has escaped from lawful custody under this Statute or has broken bail.

3. The Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular:

(a) that all reasonable steps have been taken to inform the accused of the charge; and

(b) that the accused is legally represented, if necessary by a lawyer appointed by the Court.

4. In cases where a trial cannot be held because of the deliberate absence of an accused, the Court may establish, in accordance with the Rules, an Indictment Chamber for the purpose of:

(a) recording the evidence;

(b) considering whether the evidence establishes a prima facie case of a crime within the jurisdiction of the Court; and

(c) issuing and publishing a warrant of arrest in respect of an accused against whom a prima facie case is established.

5. If the accused is subsequently tried under this Statute:

(a) the record of evidence before the Indictment Chamber shall be admissible;

(b) any judge who was a member of the Indictment Chamber may not be a member of the Trial Chamber.

Commentary

(1) The question whether trial in absentia should be permissible under the Statute has been extensively discussed in the Commission, in the Sixth Committee and in the written comments of Governments. One view, quite widely held, was that trial in absentia should be excluded entirely, on the ground, inter alia, that the Court should only be called into action in circumstances where any judgment and sentence could be enforced, and that the imposition of judgments and sentences in absentia with no prospect of enforcement would bring the Court into disrepute. Another view would allow such trial only in very limited circumstances. On the other hand some members of the Commission and some Governments were strongly supportive of trial in absentia.

(2) The 1993 draft Statute provided only that an accused should have the right "to be present at the trial, unless the Court, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate" (art. 40 (1) (d)). As a reflection of the right to be present at one's trial, which is contained in article 14 (1) (d) of the ICCPR, this was regarded as striking a satisfactory balance by many governments: others were opposed to it.

(3) There was, however, a problem with the 1993 draft statute formulation in that it did not regulate the consequences of the absence of the accused. By contrast international human rights bodies dealing with article 14 (1) (d) and its equivalent have held that trial in absentia, to be consistent with human rights standards, must be carefully regulated, with provisions for notification of the accused, for setting aside the judgment and sentence on subsequent appearance, etc. See e.g. Mbenge v. Zaire (Communication No. 16/1977, Views of the Human Rights Committee adopted 25 March 1983), in Selected Decisions of the Human Rights Committee under the Optional Protocol (1990) volume 2, p. 76; and the decisions of the European Court of Human Rights in Colozza v. Italy (1985) Ser. A No. 89; FCB v. Italy (1991) Ser. A No. 208-B; T v. Italy (1992) Ser. A No. 245-C; Poitrimol v. France (1993) Ser. A No. 277-A. See also the rather elaborate guidelines in Council of Europe Resolution (75) 11 of 21 May 1975 ("On the Criteria Governing Proceedings held in the Absence of the Accused"). The Statute of the International Tribunal for the Former Yugoslavia evidently contemplates that the accused will be present at the trial: see article 20 (2). The Rules of that Tribunal, while not providing for trial in absentia as such, do provide

for a form of public confirmation of the indictment in cases where the accused cannot be brought before it, and this procedure would fulfil some of the purposes of a trial in absentia (see Rule 61). For example, the procedure allows for the public issue of "an international arrest warrant" and could make the accused in a certain sense a fugitive from international justice.

(4) The Commission believes that it is right to begin (as the Council of Europe resolution of 1975 did) with the proposition that the presence of the accused at the trial is "of vital importance", not only because of article 14 (1) (d) of the ICCPR but in order to establish the facts and, if the accused is convicted, to enable an appropriate and enforceable sentence to be passed. Exemptions to this principle should be allowed "only in exceptional cases".

(5) The principle itself is stated in the form of a "general rule" in paragraph 1. Three exceptions are allowed for in paragraph 2: ill-health or security risks to an accused who is in custody or has been released pending trial; continued disruption to the trial (i.e. after an initial warning has been given to the accused of the consequences of such disruption); and the fact that the accused has escaped from custody under the Statute or has broken bail. It will be a matter for the Chamber to decide whether to proceed to a trial in the absence of the accused in any of these circumstances.

(6) In any case if it does so decide, the Chamber must ensure that the rights of the absent accused under the Statute are respected. Of particular importance is the right to legal representation by a court-appointed lawyer. The minimum steps to be taken are spelt out in paragraph 3.

(7) In addition, the Commission was attracted to the solution adopted in the Rules of the International Tribunal for the Former Yugoslavia, referred to above. Thus paragraph 4 allows for the Rules of the Court to establish an analogous procedure before an Indictment Chamber, which would hear and record the available evidence, determine publicly whether it amounted to a prima facie case against the accused, and take any available steps to have the accused brought before the Court for trial. Since the members of the Chamber would actually hear the witnesses and would publicly pronounce on their credibility (although to the level of a prima facie case only), it seems desirable, having regard to the considerations discussed in the commentary to article 8 (4) above, to disqualify members of an Indictment Chamber from sitting at a subsequent trial of the accused: see paragraph 5.

Article 38

Functions and powers of the Trial Chamber

1. At the commencement of the trial, the Trial Chamber shall:

(a) have the indictment read;

(b) ensure that articles 27 (5) (b) and 30 have been complied with sufficiently in advance of the trial to enable adequate preparation of the defence;

(c) satisfy itself that the other rights of the accused under this Statute have been respected; and

(d) allow the accused to enter a plea of guilty or not guilty.

2. The Chamber shall ensure that a trial is fair and expeditious and is conducted in accordance with this Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. The Chamber may, subject to the Rules, hear charges against more than one accused arising out of the same factual situation.

4. The trial shall be held in public, unless the Chamber determines that certain proceedings be in closed session in accordance with article 43, or for the purpose of protecting confidential or sensitive information which is to be given in evidence.

5. The Chamber shall, subject to this Statute and the Rules have, *inter alia*, the power on the application of a party or of its own motion, to:

(a) issue a warrant for the arrest and transfer of an accused who is not already in the custody of the Court;

(b) require the attendance and testimony of witnesses;

(c) require the production of documentary and other evidentiary materials;

(d) rule on the admissibility or relevance of evidence;

(e) protect confidential information; and

(f) maintain order in the course of a hearing.

6. The Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is maintained and preserved by the Registrar.

Commentary

(1) Article 38 deals with the general powers of the Trial Chamber with respect to the conduct of the trial. The Trial Chamber has a full range of powers in respect of the proceedings. It is envisaged that once the Trial Chamber is established it will take over all pre-trial matters in order to establish continuity in the handling of the case: see paragraph 5.

(2) The overriding obligation of the Trial Chamber is to ensure that every trial is fair and expeditious, and is conducted in accordance with the Statute, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Before proceeding to the trial the Chamber must satisfy itself that the rights of the accused have been respected, and in particular that the provisions relating to pre-trial disclosure of evidence by the prosecution have been complied with in time to allow a proper preparation of the defence: see paragraph 1 (b) and articles 27 (5) (b) and 30.

(3) Details of the procedure of the Court should be laid down in the Rules, and will no doubt evolve with experience. It is intended that the Court should itself have the right to call witnesses and ask questions, although it may also leave that task to the Prosecutor and defence counsel, and the right of the accused to present a defence must not be impaired.

(4) Paragraph 1 (d) provides that an accused is to be allowed to enter a plea of guilty or not guilty. In some legal systems there is no provision at all for such a plea; in some others, an accused is actually required to plead. In some legal systems a guilty plea substantially shortens the trial, and avoids the need for any evidence to be called on the question of culpability; in others it makes very little difference to the course of the proceedings. In line with the precedent of the Statute of the International Tribunal for the Former Yugoslavia, paragraph 1 (d) allows an accused who wishes to do so to enter a plea of guilty or not guilty, but does not require this. In the absence of a plea the accused will be presumed not guilty, and the trial will simply proceed. The Court should ascertain in advance whether an accused does wish to enter a plea: if not, the matter would simply not be raised at the trial.

(5) But the fact that the accused has decided to plead, and has entered a plea of guilty, will not mean a summary end to the trial or an automatic conviction. It will be a matter for the Chamber, subject to the Rules, to decide how to proceed. It must, at a minimum, hear an account from the

Prosecutor of the case against the accused and ensure for itself that the guilty plea was freely entered and is reliable. In many cases it may be prudent to hear the whole of the prosecution case; in others, only the key witnesses may need to be called to give evidence, or the material before the Court combined with the confession will themselves be certain proof of guilt. If the accused elects not to be legally represented, it will usually be prudent to ignore the plea and to conduct the proceedings as far as possible in the same way as if they were being vigorously defended.

(6) Paragraph 3 makes provision for joinder of charges against more than one accused in a single proceeding, although it should be open to an accused to object to joinder for sufficient reason, under procedures provided by the Rules (cf. International Tribunal for the Former Yugoslavia, rules 48, 73 (A) (IV) and 82).

(7) As a general rule trials should be held in public, but the Trial Chamber may decide to hold all or part of a trial in closed session in order, for example, to protect the accused, victims or witnesses from possible intimidation or for the purpose of protecting confidential or sensitive information which is to be given in evidence: see further article 43.

(8) Paragraph 7 requires a complete record of proceedings to be kept. By this the Commission understands a full transcript of the trial, which could take the form of a tape or video recording. The record of the trial will be of particular importance in the event of an appeal or revision under articles 48 or 50.

Article 39

Principle of legality (nullum crimen sine lege)

An accused shall not be held guilty:

(a) in the case of a prosecution with respect to a crime referred to in article 20 (a) to (d), unless the act or omission in question constituted a crime under international law;

(b) in the case of a prosecution with respect to a crime referred to in article 20 (e), unless the treaty in question was applicable to the conduct of the accused;

at the time the act or omission occurred.

Commentary

(1) The principle nullum crimen sine lege is a fundamental principle of criminal law, recognized in article 15 of ICCPR. Article 39 gives direct effect to this principle in the particular context of the Statute.

(2) The application of the principle varies according to whether the crime in question is a crime under general international law (see art. 20 (a) to (d)) or whether it involves a crime under or in conformity with a treaty provision listed in the Annex (see art. 20 (e)). As to the former, subparagraph (a) merely ensures that the relevant crime will not be applied to conduct which was not a crime under international law at the time it was committed. In this context it constitutes a specific application of the principle prohibiting the retrospective application of the criminal law.

(3) By contrast, in the case of treaty crimes the principle has an additional and crucial role to play, since it is necessary that the treaty in question should have been applicable in respect of the conduct of the accused which is the subject of the charge. Whether this requirement, contained in subparagraph (b), is satisfied in any case will be a matter for the Court to decide. In principle non-compliance with the littera verba of a treaty will not be sufficient to constitute a crime if the treaty did not apply to the accused, whether in accordance with its terms or - perhaps more importantly - because the treaty did not apply as law to the conduct of the accused. For example, an act by a national of State A on the territory of State A may not be regarded as governed by a treaty if State A was not at the time of the conduct a party to the treaty and it was not part of its law. On the other hand the nullum crimen principle does not presuppose an exclusively territorial system of the application of treaty provisions. If the treaty was properly applicable to the conduct of the accused in accordance with its terms and having regard to the link between the accused and the State or States whose acceptance of the jurisdiction is required for the purposes of article 21, the accused should not be able to deny the applicability of the treaty merely because some third State was not at the time a party to the treaty or because it was not part of the law of that third State. For example, if a person commits a crime on the territory of State X, a party on whose territory the treaty is in force, the fact that the State of the accused's nationality is not a party to the treaty would be irrelevant.

(4) Having regard to subparagraph (a), there may be circumstances in which an individual could be convicted for a crime under international law in an

international court although the same person could not be tried in a national court - although these cases will be rare. The position is different in the case of treaty crimes under subparagraph (b), since the mere existence of a treaty definition of a crime may be insufficient to make the treaty applicable to the conduct of individuals. No doubt such cases (which are also likely to be rare, and may be hypothetical) might raise issues of the failure of a State to comply with its treaty obligations, but that is not a matter which should prejudice the rights of an individual accused.

Article 40

Presumption of innocence

> An accused shall be presumed innocent until proved guilty in accordance with law. The onus is on the Prosecutor to establish the guilt of the accused beyond reasonable doubt.

Commentary

Article 40 recognizes that in a criminal proceeding the accused is entitled to a presumption of innocence and that the burden of proof rests with the prosecution. The presumption of innocence is recognized in article 14 (2) of the ICCPR ("Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law"). Since the Statute is the basic law which governs trials before the Court, it is the Statute which gives content to the words "according to law". In the Commission's view, the Prosecutor should have the burden of proving every element of the crime beyond reasonable doubt, and article 40 so provides.

Article 41

Rights of the accused

> 1. In the determination of any charge under this Statute, the accused is entitled to a fair and public hearing, subject to article 43, and to the following minimum guarantees:
>
> (a) to be informed promptly and in detail, in a language which the accused understands, of the nature and cause of the charge;
>
> (b) to have adequate time and facilities for the preparation of the defence, and to communicate with counsel of the accused's choosing;
>
> (c) to be tried without undue delay;
>
> (d) subject to article 37 (2), to be present at the trial, to conduct the defence in person or through legal assistance of the

accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court, without payment if the accused lacks sufficient means to pay for such assistance;

(e) to examine, or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution;

(f) if any of the proceedings of or documents presented to the Court are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) not to be compelled to testify or to confess guilt.

2. Exculpatory evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be made available to the defence. In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide.

Commentary

(1) Paragraph 1 of article 41 states the minimum guarantees to which an accused is entitled in relation to the trial. It reflects as closely as possible the fundamental rights of the accused set forth in article 14 of the ICCPR, which reads as follows:

> "Article 14
>
> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes of the guardianship of children.
>
> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
>
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (c) To be tried without undue delay;
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
>
> (g) Not to be compelled to testify against himself or to confess guilt.
>
> 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
>
> 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
>
> 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
>
> 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

(2) In connection with paragraph 1 (d), the question of the possibility of holding trials in absentia gave rise to conflicting views in the Commission in its last year debates. The position is now dealt with by article 37, but the right of an accused to be present at the trial has been retained as one of the guarantees of a fair trial since it is included in article 14 (3) (d) of the ICCPR: see also article 37 (2) and commentary thereto.

(3) Paragraph 2 lays down a general duty of disclosure on the Prosecutor in relation to exculpatory evidence that becomes available at any time prior to

the conclusion of the trial, whether or not the Procuracy chooses to adduce that evidence itself. In case of doubt (e.g. as to whether the information would be admissible as evidence), the Prosecutor should seek direction from the Trial Chamber. On the other hand there is no obligation to disclose incriminating evidence if it is not going to be used by the Prosecutor during the trial.

Article 42

Non bis in idem

1. No person shall be tried before any other court for acts constituting a crime of the kind referred to in article 20 for which that person has already been tried by the Court.

2. A person who has been tried by another court for acts constituting a crime of the kind referred to in article 20 may be tried under this Statute only if:

(a) the acts in question were characterized by that court as an ordinary crime and not as a crime which is within the jurisdiction of the Court; or

(b) the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted under this Statute, the Court shall take into account the extent to which a penalty imposed by another court on the same person for the same act has already been served.

Commentary

(1) The phrase non bis in idem means that no person shall be tried for the same crime twice. It is an important principle of criminal law, recognized as such in article 14 (7) of the ICCPR.

(2) Article 14 (7) has been interpreted as limited to trials within a single jurisdiction. The Commission believes that a greater degree of protection against double jeopardy is required under the Statute and article 42 gives effect to this view, drawing heavily on article 10 of the Statute of the International Tribunal for the Former Yugoslavia, with minor modifications to take account of the possibility of a previous trial in another international court or tribunal.

(3) The non bis in idem principle applies both to cases where an accused person has been first tried by the International Criminal Court, and a

subsequent trial is proposed before another court, and to the converse situation of a person already tried before some other court and subsequently accused of a crime under the Statute. In both situations, the principle only applies where the first court actually exercised jurisdiction and made a determination on the merits with respect to the particular acts constituting the crime, and where there was a sufficient measure of identity between the crimes which were the subject of the successive trials. As to the requirement of identity, article 42 uses the phrase "crime of the kind referred to in article 20". The non bis in idem prohibition does not extend to crimes of a different kind, notwithstanding that they may have arisen out of the same fact situation. For example, an accused might be charged with genocide but acquitted on the ground that the particular killing which was the subject of the charge was an isolated criminal act and was not carried out with intent to destroy a national, ethnical, racial or religious group as such, as required by article II of the Genocide Convention. Such an acquittal would not preclude the subsequent trial of the accused before a national court for murder.

(4) Where the first trial was held under this Statute and the Court reached a decision either convicting or acquitting the accused of the crime, that decision should be final, and the accused should not be subsequently tried by another court for that crime.

(5) Article 42 (2) deals with subsequent trial before the International Criminal Court in relation to a crime which has already been the subject of trial before another court. It does not in all cases bar the second trial. Instead, two exceptions are envisaged: (a) where the first trial was for an "ordinary crime"; and (b) where the first trial was a sham, i.e. was intended to protect the accused from international criminal responsibility.

(6) As to the first exception, the phrase "characterized as an ordinary crime" in paragraph 2 (a) requires explanation. Many legal systems do not distinguish between "ordinary" and other crimes, and in many cases "ordinary crimes" include very serious crimes subject to the most serious penalties. The Commission understands that the term "ordinary crime" refers to the situation where the act has been treated as a common crime as distinct from an international crime having the special characteristics of the crimes referred to in article 20 of the Statute. For example, the same act may qualify as the crime of aggravated assault under national law and torture or inhuman treatment under article 147 of the Fourth Geneva Convention of 1949. The

prohibition in article 42 should not apply where the crime dealt with by the earlier court lacked in its definition or application those elements of international concern, as reflected in the elements of general international law or applicable treaties, which are the basis for the International Criminal Court having jurisdiction under article 20.

(7) As to the second exception, paragraph 2 (b) reflects the view that the Court should be able to try an accused if the previous criminal proceeding for the same acts was really a "sham" proceeding, possibly even designed to shield the person from being tried by the Court. The Commission adopted the words "the case was not diligently prosecuted" on the understanding that they are not intended to apply to mere lapses or errors on the part of the earlier prosecution, but to a lack of diligence of such a degree as to be calculated to shield the accused from real responsibility for the acts in question. Paragraph 2 (b) is designed to deal with exceptional cases only.

(8) In the event that the Court convicts a person under either of the situations contemplated in paragraph 2, it must take into consideration in the determination of the appropriate penalty the extent to which the person has actually served a sentence imposed by another court for the same acts: see paragraph 3.

(9) One member of the Commission would have preferred not to deal at all with subsequent trial in national courts, on the basis that the Court's jurisdiction is of an exceptional character, and that the general principles of the relevant national law can be relied on to avoid injustices arising from more than one trial of a person arising out of particular conduct.

Article 43

Protection of the accused, victims and witnesses

> The Court shall take necessary measures available to it to protect the accused, victims and witnesses and may to that end conduct closed proceedings or allow the presentation of evidence by electronic or other special means.

Commentary

(1) The Court should throughout take the necessary steps to protect the accused, as well as victims and witnesses. The non-exhaustive list of such measures provided in this article include ordering that the trial should be conducted in closed proceedings or allowing the presentation of evidence by electronic means such as video cameras.

(2) While the Court is required to have due regard for the protection of victims and witnesses, this must not interfere with full respect for the right of the accused to a fair trial. Thus while the Court may order the non-disclosure to the media or the general public of the identity of a victim or witness, the right of an accused to question the prosecution witnesses must be respected: see article 41 (1) (e). On the other hand, such procedures as giving testimony by video camera may be the only way to allow a particularly vulnerable victim or witness (e.g. a child who has witnessed some atrocity) to speak.

(3) The security of the record of proceedings is vital, and should be a matter for regulation under the Rules.

Article 44

Evidence

1. Before testifying, each witness shall, in accordance with the Rules, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. States parties shall extend their laws of perjury to cover evidence given under this Statute by their nationals, and shall cooperate with the Court in investigating and where appropriate prosecuting any case of suspected perjury.

3. The Court may require to be informed of the nature of any evidence before it is offered so that it may rule on its relevance or admissibility.

4. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

5. Evidence obtained by means of a serious violation of this Statute or of other rules of international law shall not be admissible.

Commentary

(1) While some members of the Commission felt that the issue of the rules of evidence should not be covered in the Statute itself (cf. art. 19 (1) (b)), others felt that basic provisions should be included. Article 44 is a via media, dealing only with certain more important aspects on the basis that most issues can be appropriately dealt with in the Rules: cf. International Tribunal for the Former Yugoslavia, Rules 89-106.

(2) To help ensure that testimony given is reliable, witnesses should undertake to tell the truth, in a form prescribed by the Rules. In the legal systems of some States the accused is not required to take an oath before

testifying; it will be a matter for the Rules to take account of such situations. The Statute does not include a provision making it a crime to give false testimony before the Court. On balance the Commission thought that prosecutions for perjury should be brought before the appropriate national court, and paragraph 2 so provides.

(3) The prosecution or defence may be required to inform the Court of the nature and purpose of evidence to be offered in the trial to enable it to rule on its relevance or admissibility: see paragraph 3, which is similar to article 20 of the Nürnberg Charter. This should assist the Court to ensure an expeditious trial limited in scope to a determination of the charges against the accused and issues properly related thereto. Some members also stressed the desirability of this provision to prevent the collection or production of evidence from being used as a delaying tactic during the trial, as well as the substantial costs which may be involved in translating inadmissible or immaterial evidence. Other members felt strongly that this provision should not be interpreted as allowing the Court to exclude evidence in *ex parte* or closed proceedings.

(4) Under paragraph 4, the Court may take judicial notice of facts which are common knowledge rather than requiring proof of them (cf. art. 21 of the Nürnberg Charter).

(5) The Court should exclude any evidence obtained by illegal means which constitute a serious breach of the Statute or of international law (including, but not limited to, internationally protected human rights). One member suggested that only evidence obtained in violation of a peremptory norm of human rights law should be inadmissible. However, others felt that the Court should exclude any evidence obtained in violation of international law, provided that the violation was serious, and paragraph 5 so provides.

Article 45

Quorum and judgment

1. At least four members of the Trial Chamber must be present at each stage of the trial.

2. The decisions of the Trial Chamber shall be taken by a majority of the judges. At least three judges must concur in a decision as to conviction or acquittal and as to the sentence to be imposed.

3. If after sufficient time for deliberation a Chamber which has been reduced to four judges is unable to agree on a decision, it may order a new trial.

4. The deliberations of the Court shall be and remain secret.

5. The judgment shall be in writing and shall contain a full and reasoned statement of the findings and conclusions. It shall be the sole judgment issued, and shall be delivered in open court.

Commentary

(1) Article 45 lays down the general rules concerning the necessary quorum during the trial and the extent of agreement required for taking decisions.

(2) Paragraph 1 requires four judges to be present at all times. This would not include alternate judges under article 9 (6) who had not yet been called on to act. Decisions as to conviction or acquittal and as to the sentence to be imposed require three affirmative votes, although the Chamber should make every effort to reach a unanimous decision.

(3) Provision is made in paragraph 3 for cases of failure to agree. The power of a Trial Chamber to order a retrial in such cases is strictly circumscribed. Such a power does not exist in some national systems; the trial court is required to reach a judgment, and if it cannot do so should acquit the accused. A retrial under the Statute is only possible where the Chamber has been reduced to four members only (e.g. by death or disability of one member) and they are deadlocked. Every effort should be made (e.g. through the use of alternate judges under article 9 (6)) to avoid this happening, and some members thought that in these cases the benefit of the doubt should always favour the accused.

(4) The deliberations of the Court are to be held in private and must remain secret: see paragraph 4.

(5) The Court is to publish a single judgment reflecting the opinion of the majority of judges, and with no dissenting or separate opinions: see paragraph 5. Different views were expressed on the desirability of allowing separate or dissenting opinions. Some felt that they could undermine the authority of the Court and its judgments. Other members believed that judges should have the right to issue separate, and especially dissenting, opinions as a matter of conscience, if they chose to do so, pointing out that this was expressly allowed by article 23 (2) of the Statute of the International Tribunal for the Former Yugoslavia. It was also suggested that these opinions would be important in the event of an appeal. On balance the Commission preferred the former view.

(6) As noted in the commentary to article 42, an acquittal on a charge under the Statute does not preclude the possibility that the accused may be guilty

of some crime under national law arising out of the same facts. It would no longer be justified to detain an accused after a final judgment of acquittal under the Statute, but the Court should, subject to the rule of specialty under article 55, be able to make arrangements for the transfer of a person to the relevant State in such circumstances.

Article 46

Sentencing

1. In the event of a conviction, the Trial Chamber shall hold a further hearing to hear any evidence relevant to sentence, to allow the Prosecutor and the defence to make submissions and to consider the appropriate sentence to be imposed.

2. In imposing sentence, the Trial Chamber should take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

Commentary

(1) Sentencing is generally considered to represent a separate process which is distinct from the trial. The purpose of the trial is to determine the truth of the charges against the accused; the purpose of the sentencing hearing is to determine an appropriate punishment in relation to the individual as well as the crime. Of course the fundamental procedural guarantees inherent in a fair trial, notably the right to counsel, also extend to the sentencing hearing. The Commission felt that these considerations merited a further and separate sentencing hearing: this is provided for in paragraph 1, although details of the procedure are left to the Rules.

(2) At the conclusion of the sentencing hearing, the Court is required to consider the matter in private, and to decide on an appropriate sentence, having regard to such factors as the degree of punishment commensurate with the crime in accordance with the general principle of proportionality.

Article 47

Applicable penalties

1. The Court may impose on a person convicted of a crime under this Statute one or more of the following penalties:

(a) a term of life imprisonment, or of imprisonment for a specified number of years;

(b) a fine.

2. In determining the length of a term of imprisonment or the amount of a fine to be imposed, the Court may have regard to the penalties provided for by the law of:

(a) the State of which the convicted person is a national;

(b) the State where the crime was committed; and

(c) the State which had custody of and jurisdiction over the accused.

3. Fines paid may be transferred, by order of the Court, to one or more of the following:

(a) the Registrar, to defray the costs of the trial;

(b) a State the nationals of which were the victims of the crime;

(c) a trust fund established by the Secretary-General of the United Nations for the benefit of victims of crime.

Commentary

(1) Article 47 specifies the penalties available to the Court in determining the appropriate punishment in a particular case. They are a term of imprisonment up to and including life imprisonment and a fine of a specified amount. The Court is not authorized to impose the death penalty.

(2) In determining the term of imprisonment or the amount of fine to be imposed, the Court may consider the relevant provisions of the national law of the States which have a particular connection to the person or the crime committed, namely the State of which the convicted person is a national, the State where the crime was committed and the State which had custody of and jurisdiction over the accused.

(3) The 1993 draft Statute provided for the Court to order restitution or forfeiture of property used in conjunction with the crime. However, some members of the Commission questioned the ability of the Court to determine the ownership of stolen property in the absence of a claim filed by the original owner, which might need to be considered in a separate proceeding. Others felt that it was not appropriate to authorize the Court to order the return of stolen property, a remedy which they considered to be more appropriate in a civil rather than a criminal case. One member suggested that allowing the Court to consider such matters would be inconsistent with its primary function, namely to prosecute and punish without delay perpetrators of the crimes referred to in the Statute. On balance the Commission considered that

these issues were best left to national jurisdictions and to international judicial cooperation agreements, of which there is a growing network. The relevant provisions have accordingly been deleted.

(4) Some other members of the Commission while regretting that decision, felt that as a consequence provisions such as those in article 47 (3) (b) and (c) should also be deleted, since these were in a sense aimed at reparation for victims. On the other hand, although a reflection of concern for victims of crimes, subparagraphs 3 (b) and (c) are not intended in any way to substitute for reparation or to prevent any action which victims may take to obtain reparation through other courts or on the international plane.

(5) Some members felt that sanctions other than detention should exceptionally be provided for. In particular, the Court should, in their view, be empowered to order community service in aid of the victim or society at large. Other members stressed that, as the Court would only deal with the most serious crimes, the idea of "community service" was entirely inappropriate.

PART 6. APPEAL AND REVIEW

Article 48

Appeal against judgment or sentence

1. The Prosecutor and the convicted person may, in accordance with the Rules, appeal against a decision under articles 45 or 47 on grounds of procedural error, error of fact or of law, or disproportion between the crime and the sentence.

2. Unless the Trial Chamber otherwise orders, a convicted person shall remain in custody pending an appeal.

Commentary

(1) Under article 14 (5) of the ICCPR, "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher court according to law". This right is provided for in article 25 of the Statute of the International Tribunal for the Former Yugoslavia. It is equally provided for in article 48 of the present Statute. The right to appeal may be regulated by the Rules, for example as to such matters as time-limits for an appeal.

(2) Appeals may be brought either against judgment or sentence. The Commission believes that the right to appeal should exist equally for the Prosecutor and the convicted person. The grounds for appeal may relate to one

or more of the following: procedural error, errors of fact or law, or disproportion between the crime and the sentence. The standard to be applied by the Appeals Chamber, and its power to alter a decision or order a new trial, are dealt with in article 49.

Article 49

Proceedings on appeal

1. The Appeals Chamber has all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair or that the decision is vitiated by error of fact or law, it may:

(a) if the appeal is brought by the convicted person, reverse or amend the decision, or, if necessary, order a new trial;

(b) if the appeal is brought by the Prosecutor against an acquittal, order a new trial.

3. If in an appeal against sentence the Chamber finds that the sentence is manifestly disproportionate to the crime, it may vary the sentence in accordance with article 47.

4. The decision of the Chamber shall be taken by a majority of the judges, and shall be delivered in open court. Six judges constitute a quorum.

5. Subject to article 50, the decision of the Chamber shall be final.

Commentary

(1) Proceedings on appeal are regulated by article 49. The appeal is heard by the Appeals Chamber (as to which see art. 9 (1)-(3)), presided over by the President or (if the President is unavailable or disqualified) by a Vice-President. Although under article 48 the right of appeal exists for both Prosecutor and defence, and extends equally to errors of procedure, error of fact or law and disproportion between crime and sentence, there is an important difference between appeals by prosecution and defence: the only relief the Court can grant in an appeal by the Prosecutor from an acquittal on a particular charge is an order for a retrial. It is not open to the Appeals Chamber to reverse or amend a decision of a Trial Chamber acquitting an accused on a given charge as distinct from annulling that decision as a prelude to a new trial. In other respects the Appeals Chamber has all the powers of a Trial Chamber.

(2) Thus the Appeals Chamber combines some of the functions of appel in civil law systems with some of the functions of cassation. This was thought to be desirable, having regard to the existence of only a single appeal from decisions at trial.

(3) Not every error at the trial need lead to reversal or annulment: the error must have been a significant element in the decision taken. This is expressed in paragraph 2 by the requirement that the proceedings must have been, overall, procedurally unfair or the decision must be vitiated by the error. As to sentencing, paragraph 3 requires that a sentence be manifestly disproportionate to the crime before the Court should vary the sentence. The Court will - like national appellate courts - necessarily have to exercise a certain discretion in these matters, with any doubt being resolved in favour of the convicted person.

(4) Decisions would be reached by majority (i.e. four judges), and should be published.

(5) Like article 45, article 49 does not allow for dissenting or separate opinions. While some members felt that such opinions should not be allowed for the reasons expressed in connection with article 45 (5), others considered such opinions essential with respect to appellate decisions which deal with important questions of substantive and procedural law. The Commission concluded however that no distinction should be made between the two situations, and that separate and dissenting opinions on appeal should be prohibited.

(6) It is not intended that the appeal should amount to a retrial. The Court would have power if necessary to allow new evidence to be called, but it would normally rely on the transcript of the proceedings at the trial.

Article 50

Revision

1. The convicted person or the Prosecutor may, in accordance with the Rules, apply to the Presidency for revision of a conviction on the ground that evidence has been discovered which was not available to the applicant at the time the conviction was pronounced or affirmed and which could have been a decisive factor in the conviction.

2. The Presidency shall request the Prosecutor or the convicted person, as the case may be, to present written observations on whether the application should be accepted.

3. If the Presidency is of the view that the new evidence could lead to the revision of the conviction, it may:

(a) reconvene the Trial Chamber;

(b) constitute a new Trial Chamber; or

(c) refer the matter to the Appeals Chamber;

with a view to the Chamber determining, after hearing the parties, whether the new evidence should lead to a revision of the conviction.

Commentary

(1) A person convicted of a crime may, in accordance with the Rules, apply for revision of a judgment on the ground that a new evidence has been discovered, which was not known to the accused at the time of the trial or appeal and which could have been a decisive factor in the conviction. This reflects the provisions of article 14 (6) of the ICCPR, as well as article 61 (1) of the Statute of the International Court of Justice, and is a necessary guarantee against the possibility of factual error relating to material not available to the accused and therefore not brought to the attention of the Court at the time of the initial trial or of any appeal. The Commission believes that it should be available only in the case of a conviction. There are safeguards in the Statute against unfounded prosecution (see e.g. arts. 26 (1) and (4) and 27 (2)), but once a prosecution has been duly launched and conducted it would be a violation of the non bis in idem principle to allow revision of an acquittal on grounds of the discovery of new evidence (cf. arts. 42 (1) and (2)). On the other hand the right to apply for revision of a conviction should extend to the Prosecutor as well as the convicted person, on the ground that the Prosecutor has an equal interest with the defence in securing a just and reliable outcome in proceedings brought under the Statute.

(2) The right to apply for revision must be based on new evidence which could have been a decisive factor in the conviction. It does not extend, for example, to alleged errors in the assessment of facts presented at the trial or to errors of law or procedure, which are a matter for the appeals process. Having regard to these limitations and to the need to avoid frivolous applications, the Presidency has power to decide under paragraph 3 whether or not to accept an application for revision. If, after considering written submissions from the convicted person and the Prosecutor, it decides to accept the application, it may reconvene the Trial Chamber, constitute a new Chamber,

or (for example, if the truth of the new fact relied on is not in issue) refer the matter to the Appeals Chamber. The procedure to be adopted for the hearing of an application for revision should be regulated by the Rules.

PART 7. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 51

Cooperation and judicial assistance

1. States parties shall cooperate with the Court in connection with criminal investigations and proceedings under this Statute.

2. The Registrar may transmit to any State a request for cooperation and judicial assistance with respect to a crime, including, but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents;

(d) the arrest or detention of persons; and

(e) any other request which may facilitate the administration of justice, including provisional measures as required.

3. Upon receipt of a request under paragraph 2:

(a) in a case covered by article 21 (1) (a), all States parties;

(b) in any other case, States parties which have accepted the jurisdiction of the Court with respect to the crime in question;

shall respond without undue delay to the request.

Commentary

(1) The effective functioning of the Court will depend upon the international cooperation and judicial assistance of States. Thus States parties to the Statute should cooperate with criminal investigations conducted by the Prosecutor and respond without undue delay to any request from the Court regarding, for example, the location of persons, the taking of testimony, the production of evidence, the service of documents, etc. Article 51 states this general obligation in terms adapted from article 29 of the Statute of the International Tribunal for the Former Yugoslavia, it being understood that issues of implementation will be worked out between the Court and the

requested State. Article 51 is without prejudice to the more precise and graduated obligations imposed, for example, by article 53 in relation to the transfer of accused persons.

(2) One important difference as compared with the Yugoslav Tribunal is that the present Court has jurisdiction over a wider range of matters and that its jurisdiction is not limited in time and place. Moreover, some States parties to the Statute may not be parties to one or more of the treaties in the Annex, or may not have accepted the Court's jurisdiction over crimes defined by those treaties. These factors would have to be taken into account in giving effect to the general obligation of cooperation under paragraph 1.

(3) Some members of the Commission thought that article 51 went too far in imposing a general obligation of cooperation on States parties to the Statute, independently of whether they are parties to relevant treaties or have accepted the Court's jurisdiction with respect to the crime in question. They would therefore prefer article 51 to say no more than that parties would use their "best efforts" to cooperate, thus incorporating a greater element of flexibility and discretion.

(4) Paragraph 2 is an empowering provision, providing for the Registrar to make requests to States for cooperation. Paragraph 3 requires a prompt response to such requests from the States specified in that paragraph. It does not, in terms, require States to comply with such requests, since whether they will be able to do so will depend on the circumstances: a State cannot, for example, arrest a person who has fled its territory. The substantive obligation of States parties in relation to requests made under paragraph 2 is contained in paragraph 1.

Article 52

Provisional measures

1. In case of need, the Court may request a State to take necessary provisional measures, including the following:

(a) to provisionally arrest a suspect;

(b) to seize documents or other evidence; or

(c) to prevent injury to or the intimidation of a witness or the destruction of evidence.

2. The Court shall follow up a request under paragraph 1 by providing, as soon as possible and in any case within 28 days, a formal request for assistance complying with article 57.

Commentary

(1) When circumstances so require, the Court may request a State or States to take provisional measures, including measures to prevent an accused from leaving its territory or the destruction of evidence located there. Such a request may include provisional arrest of a suspect pursuant to a warrant issued under article 28 (1). See also article 9 of the Model Treaty on Extradition adopted by the General Assembly in resolution 45/116 on 14 December 1990.

(2) A request for provisional measures may have to be made very quickly and in circumstances where a fully documented request would take too long to prepare. Paragraph 2 provides that a formal request for assistance under Part 7 should be made within 28 days of such a provisional request.

(3) Article 52 is essentially an empowering provision so far as the Court is concerned. Obligations of cooperation on the part of States parties are dealt with in article 51 (1).

Article 53

Transfer of an accused to the Court

1. The Registrar shall transmit to any State on the territory of which the accused may be found a warrant for the arrest and transfer of an accused issued under article 28, and shall request the cooperation of that State in the arrest and transfer of the accused.

2. Upon receipt of a request under paragraph 1:

(a) all States parties:

(i) in a case covered by article 21 (1) (a), or

(ii) which have accepted the jurisdiction of the Court with respect to the crime in question;

shall, subject to paragraphs 5 and 6, take immediate steps to arrest and transfer the accused to the Court;

(b) in the case of a crime to which article 20 (e) applies, a State party which is a party to the treaty in question but which has not accepted the Court's jurisdiction with respect to that crime shall, if it decides not to transfer the accused to the Court, forthwith take all necessary steps to extradite the accused to a requesting State or refer the case to its competent authorities for the purpose of prosecution;

(c) in any other case, a State party shall consider whether it can, in accordance with its legal procedures, take steps to arrest and transfer the accused to the Court, or whether it should take steps to extradite the accused to a requesting State or refer the case to its competent authorities for the purpose of prosecution.

3. The transfer of an accused to the Court constitutes, as between States parties which accept the jurisdiction of the Court with respect to the crime, sufficient compliance with a provision of any treaty requiring that a suspect be extradited or the case referred to the competent authorities of the requested State for the purpose of prosecution.

4. A State party which accepts the jurisdiction of the Court with respect to the crime shall, as far as possible, give priority to a request under paragraph 1 over requests for extradition from other States.

5. A State party may delay complying with paragraph 2 if the accused is in its custody or control and is being proceeded against for a serious crime, or serving a sentence imposed by a court for a crime. It shall within 45 days of receiving the request inform the Registrar of the reasons for the delay. In such cases, the requested State:

(a) may agree to the temporary transfer of the accused for the purpose of standing trial under this Statute; or

(c) shall comply with paragraph 2 after the prosecution has been completed or abandoned or the sentence has been served, as the case may be.

6. A State party may, within 45 days of receiving a request under paragraph 1, file a written application with the Registrar requesting the Court to set aside the request on specified grounds. Pending a decision of the Court on the application, the State concerned may delay complying with paragraph 2 but shall take any provisional measures necessary to ensure that the accused remains in its custody or control.

Commentary

(1) Having regard to article 37 of the Statute and to the need to establish a clear relationship between existing obligations to try or extradite and the Statute, article 53 is a crucial provision. For the reasons explained in the commentary to article 51, it is necessary to distinguish between the various levels of obligation States parties to the Statute may have accepted, which can range from not being a party to a relevant treaty defining a crime, on the one hand, to having accepted the jurisdiction of the Court over such crimes in all cases, on the other hand. Article 53 is drafted accordingly. Moreover, the Statute differs from the Statute of the International Tribunal for the Former Yugoslavia, article (9) (2) of which proclaims the Tribunal's "primacy over national courts". By contrast the present Statute operates in principle on the basis of concurrent jurisdiction.

(2) In the first place, the Registrar may request any State to cooperate in the arrest and transfer of an accused pursuant to a warrant issued under article 28. As to States not parties to the Statute, no obligation of transfer can be imposed, but cooperation can be sought in accordance with article 56. The term "transfer" has been used to cover any case where an accused is made available to the Court for the purpose of trial, in order to avoid any confusion with the notion of extradition or other forms of surrender of persons (e.g. under status of forces agreements) between two States.

(3) Paragraph 2 spells out the extent of the obligation of a State party to respond to a transfer request. Four different situations have to be considered, as follows:

(a) All States parties to the Statute will have accepted the Court's "inherent" jurisdiction over genocide under articles 20 (a) and 21 (1) (a). In that case, subject to the other safeguards and guarantees in the Statute, the transfer obligation in article 53 (2) (a) will apply.

(b) The same obligation should apply to States parties which have accepted the jurisdiction of the Court with respect to the crime in question; they must take immediate steps to arrest and surrender the accused person to the Court under paragraph 2 (a).

(c) In the case of crimes defined by the annexed treaties, a State party which is also a party to the relevant treaty defining the crime in question but which has not accepted the Court's jurisdiction must arrest and either transfer, extradite or prosecute the accused.

(d) In any other case, a State party must consider whether its own law permits the arrest and transfer of the accused. As to other crimes under general international law, some States may not have some of these crimes (e.g. aggression) as part of their own criminal code; it was thought that the only obligation that could be imposed in such cases, if a State does not accept the jurisdiction of the Court in relation to the crimes, was that spelt out in paragraph 2 (c).

(4) As to the relationship between extradition and transfer, several provisions of article 53 are relevant. Under paragraph 2 (b), a State which is a party to the relevant treaty defining the crime but which has not accepted the jurisdiction of the Court with respect to a crime is under an aut dedere aut judicare obligation, and thus has the option of extraditing the accused to a requesting State. (If an extradition request has been granted or is pending and is subsequently granted, the requesting State must, anyway,

have accepted the jurisdiction of the Court before it can proceed with the case: see article 21 (2).) Under paragraph 4, a State party which accepts the Court's jurisdiction over the crime must, as far as possible, give priority to a transfer request from the Court, bearing in mind that such a request will not have been made before the confirmation of the indictment and an opportunity on the part of the interested States to challenge the Court's jurisdiction or the admissibility of the particular case, which is provided for under articles 34 or 35. The words "as far as possible" inserted in paragraph 4 reflect, on the one hand, the inability of the Statute to affect the legal position of non-parties, and, on the other hand, the difficulties of imposing a completely homogeneous obligation on States parties to the Statute given the wide range of situations covered.

(5) Transfer to the Court is to be taken, as between parties to the Statute which accept the jurisdiction of the Court with respect to the crime, to constitute compliance with aut dedere aut judicare provisions in extradition treaties: paragraph 3. In other cases it is recognized that the decision as between transfer or extradition must rest with the requested State, in particular so far as requests from non-parties to the Statute are concerned, and this being so there is no reason to disadvantage requesting States that have become parties to the Statute but have not accepted the Court's jurisdiction in a given case.

(6) Taking these various provisions together, it is the view of the Commission that these provisions provide adequate guarantees that the Statute will not undermine existing and functional extradition arrangements. Some members, however, felt that paragraph 4 went too far in the direction of giving priority to the Court's jurisdiction as compared with that of a State requesting extradition: they stressed that the Court should in no case interfere with existing and functioning extradition agreements.

(7) A State party which receives a transfer request may take action under paragraphs 5 or 6. Paragraph 5 allows a requested State to delay complying while the accused is tried before its own courts for a serious crime, or completes a sentence imposed for a crime. This is without prejudice to the possibility of temporary transfer of a prisoner for the purpose of standing trial under the Statute for some other crime within the jurisdiction of the Court; in such cases arrangements could be made for any sentence imposed under the Statute to be served concurrently or consecutively in the State concerned.

(8) Alternatively, a requested State may apply under paragraph 6 to have the request set aside for sufficient reason. The Court in dealing with such an application would have regard to article 35 and to the preamble.

(9) In case of delay under paragraph 5, the Court must be informed of the reasons for the delay; in case of an application under paragraph 6, necessary provisional measures must be taken. The Registrar might also arrange with a State which has in its custody a person arrested under the Statute for the person to continue to be held in that State pending trial.

Article 54

Obligation to extradite or prosecute

> In a case of a crime referred to in article 20 (e), a custodial State party to this Statute which is a party to the treaty in question but which has not accepted the Court's jurisdiction with respect to the crime for the purposes of article 21 (1) (b) (i) shall either take all necessary steps to extradite the suspect to a requesting State for the purpose of prosecution or refer the case to its competent authorities for that purpose.

Commentary

(1) The role of article 54 in the scheme of the Statute has been referred to already: see commentary to article 21. Article 54 is, in effect, a corollary for States parties to the Statute of unwillingness to accept the Court's jurisdiction in respect of apparently well-founded charges of treaty crimes.

(2) Thus, a State party whose acceptance of the Court's jurisdiction is necessary, but which does not accept the jurisdiction, is under an aut dedere aut judicare obligation, equivalent to the obligation included in most of the treaties listed in the Annex. As between parties to the Statute this in effect integrates the International Criminal Court into the existing system of international criminal jurisdiction and cooperation in respect of treaty crimes. It should avoid the situation of a State party in effect giving asylum to an accused person in relation to prima facie justified charges of crimes which have been accepted as such by that State. On the other hand it gives States parties the same range of options when confronted with a request for transfer of an accused that they have now under the listed treaties, unless the State in question has expressly accepted the jurisdiction of the Court in relation to the crime: see article 53 (2) (a).

(3) The Commission gave careful consideration to the question whether an equivalent obligation should be imposed on States parties generally with

respect to the crimes under international law referred to in article 20 (b)-(d). On balance it decided that this was difficult to achieve with respect to such crimes in the absence of a secure jurisdictional basis or a widely accepted extradition regime. The problem is most acute with respect to article 20 (d) (crimes against humanity), but many States do not have as part of their criminal law a provision specifically dealing with such crimes.

Article 55

Rule of speciality

1. A person transferred to the Court under article 53 shall not be subject to prosecution or punishment for any crime other than that for which the person was transferred.

2. Evidence provided under this Part shall not, if the State when providing it so requests, be used as evidence for any purpose other than that for which it was provided, unless this is necessary to preserve the right of an accused under article 41 (2).

3. The Court may request the State concerned to waive the requirements of paragraphs 1 or 2, for the reasons and purposes specified in the request.

Commentary

(1) Article 55 states a rule of speciality (sometimes referred to as the rule of identity of transfer and trial). It is intended to ensure that a person delivered to the Court can only be prosecuted or punished for the crime indicated in the initial request: see paragraph 1. Similarly, evidence tendered to the Court can only be used as evidence for the purpose stated in the original request if the State when providing the information so requests: paragraph 2. This is subject, however, to the rights of an accused to disclosure of exculpatory evidence under article 41 (2).

(2) A distinction must be drawn between the tender of evidence as such and the use of information as a basis for the investigation of the same person for other crimes or for the investigation of other persons who may have been involved in related criminal activity. The limitation in paragraph 2 only applies to the former situation.

(3) The Court may request the State concerned to waive the limitation under article 55: see paragraph 3. It will be a matter for the requested State to decide whether to do so.

Article 56

Cooperation with States not parties to this Statute

States not parties to this Statute may assist in relation to the matters referred to in this Part on the basis of comity, a unilateral declaration, an ad hoc arrangement or other agreement with the Court.

Commentary

Article 56 recognizes that all States as members of the international community have an interest in the prosecution, punishment and deterrence of the crimes covered by the Statute. Thus, even those States which are not parties to the Statute are encouraged to cooperate with and to provide assistance to the Court on the basis of a unilateral declaration, which may be general or specific in character, an ad hoc arrangement for a particular case, or some other type of agreement between the State and the Court.

Article 57

Communications and documentation

1. Requests under this Part shall be in writing, or be forthwith reduced to writing, and shall be between the competent national authority and the Registrar. States parties shall inform the Registrar of the name and address of their national authority for this purpose.

2. When appropriate, communications may also be made through the International Criminal Police Organization.

3. A request under this Part shall include the following, as applicable:

(a) a brief statement of the purpose of the request and of the assistance sought, including the legal basis and grounds for the request;

(b) information concerning the person who is the subject of the request on the evidence sought, in sufficient detail to enable identification;

(c) a brief description of the essential facts underlying the request; and

(d) information concerning the complaint or charge to which the request relates and of the basis for the Court's jurisdiction.

4. A requested State which considers the information provided insufficient to enable the request to be complied with may seek further particulars.

Commentary

(1) Under article 57, communications should normally be between the Registrar and the competent national authorities of the State concerned and should be in writing. There is also the possibility of communications with or through the International Criminal Police Organization (INTERPOL).

(2) Any request made to a State under Part 7 must be accompanied by a sufficient explanation of its purpose and legal basis as well as appropriate documentation, in accordance with paragraph 3. The State may ask the Court to provide additional information if necessary. This article is based on a similar provision contained in article 5 of the Model Treaty on Mutual Assistance in Criminal Matters (adopted by General Assembly resolution 45/117 on 14 December 1990).

PART 8. ENFORCEMENT

Article 58

Recognition of judgments

States parties undertake to recognize the judgments of the Court.

Commentary

(1) States parties to the Statute must recognize the judgments of the Court, in the sense of treating those judgments, unless set aside under Part 6, as authoritative for the purposes of the Statute: cf. article 42. Thus a judgment of the Court should be capable of founding a plea of res judicata or issue estoppel or their equivalents under legal systems which recognize those pleas. On the other hand more affirmative obligations of enforcement are imposed not by article 58 but by article 59 and by Part 7 of the Statute.

(2) Depending on their constitutional systems, it may be necessary for States parties to enact legislation or to introduce administrative measures to give effect to this and other obligations under Part 8. The content of such legislation will depend on the national system concerned, and cannot be prescribed in advance.

(3) Some members doubted whether a mere obligation to recognize a judgment of the Court had any particular meaning. In their view, the obligation, to be meaningful, should extend to recognizing the appropriate legal consequences of a judgment. The judgment itself would be enforced under the Statute and did not as such require recognition by States. Others favoured the deletion of the article.

Article 59

Enforcement of sentences

1. A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept convicted persons.

2. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State.

3. A sentence of imprisonment shall be subject to the supervision of the Court in accordance with the Rules.

Commentary

(1) Prison sentences imposed by the Court are to be served in the prison facilities of a State designated by the Court or, in the absence of such a designation, in the State where the Court has its seat. Since the limited institutional structure of the Court, in its initial stages at least, would not include a prison facility, States parties would be requested to offer the use of such facilities to the Court.

(2) While the prison facilities would continue to be administered by the relevant national authority, the terms and conditions of imprisonment should be in accordance with international standards, notably the Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crimes and the Treatment of Offenders, Geneva, 1955, and approved by Economic and Social Council resolutions 663-C (XXIV), 31 July 1957, and 2076 (LXII), 13 May 1977. The imprisonment would also be subject to the supervision of the Court, the details of which would be elaborated in the Rules. For example, the Rules could establish procedures under which a convicted person could seek redress for maltreatment and provide for periodic reports by the national authorities, taking into consideration on the one hand the limited institutional structure of the Court and the difficulties of administering different standards within a single prison facility, and on the other hand the necessary guarantees of international minimum standards. For the most part the Commission believes that arrangements can be made through a combination of delegation of custodial and administrative authority to the State concerned combined with periodic reporting, and provision for review of complaints.

(3) In recognition of the substantial costs involved in the incarceration of convicted persons for prolonged periods of time, it is desirable that States

parties share the burden of such costs as expenses of the Court. This will need to be worked out as part of the financial structure of the Statute, as to which see paragraph (5) of the commentary to article 2.

Article 60

Pardon, parole and commutation of sentences

> 1. If, under a generally applicable law of the State of imprisonment, a person in the same circumstances who had been convicted for the same conduct by a court of that State would be eligible for pardon, parole or commutation of sentence, the State shall so notify the Court.
>
> 2. If a notification has been given under paragraph 1, the prisoner may apply to the Court in accordance with the Rules, seeking an order for pardon, parole or commutation of the sentence.
>
> 3. If the Presidency decides that an application under paragraph 2 is apparently well-founded, it shall convene a Chamber of five judges to consider and decide whether in the interests of justice the person convicted should be pardoned or paroled or the sentence commuted, and on what basis.
>
> 4. When imposing a sentence of imprisonment, a Chamber may stipulate that the sentence is to be served in accordance with specified laws as to pardon, parole or commutation of sentence of the State of imprisonment. The consent of the Court is not required to subsequent action by that State in conformity with those laws, but the Court shall be given at least 45 days' notice of any decision which might materially affect the terms or extent of the imprisonment.
>
> 5. Except as provided in paragraphs 3 and 4, a person serving a sentence imposed by the Court is not to be released before the expiry of the sentence.

Commentary

(1) The Commission felt that the Statute should provide for the possibility of pardon, parole and commutation of sentence. Some members felt that such questions should be decided on the basis of a uniform standard, while others stressed the consideration of efficient administration of justice by the relevant national authorities. Article 60 seeks to balance these considerations by providing for a regime of pardon, parole and commutation of sentence that gives the Court control over the release of the accused but allows for relatively uniform administration at the national level.

(2) In particular, it provides that the State where the person is imprisoned must notify the Court if the person would be eligible for pardon, parole or commutation of sentence under the law of that State: paragraph 1. This would

enable the prisoner to apply to the Court, in accordance with the Rules, for an order granting pardon, parole or commutation of the sentence. The Presidency would convene a Chamber to consider the matter if the application appeared to be well-founded.

(3) In imposing sentence, the Court might instead specify that the sentence should be governed by the applicable national law on these matters, in effect delegating the issue to the custodial State. In such cases, the Court must be notified prior to any decision that would materially affect the terms or extent of imprisonment, but its consent would not be required.

(4) Except as provided in article 60, a prisoner must not be released before the sentence imposed by the Court has been served.

Annex

Crimes pursuant to Treaties (see art. 20 (e))

1. Grave breaches of:

   (i) the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, as defined by Article 50 of that Convention;

   (ii) the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, as defined by Article 51 of that Convention;

   (iii) the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, as defined by Article 130 of that Convention;

   (iv) the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, as defined by Article 147 of that Convention;

   (v) Protocol I Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, as defined by Article 85 of that Protocol.

2. The unlawful seizure of aircraft as defined by Article 1 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970.

3. The crimes defined by Article 1 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971.

4. Apartheid and related crimes as defined by Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973.

5. The crimes defined by Article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973.

6. Hostage-taking and related crimes as defined by Article 1 of the International Convention against the Taking of Hostages of 17 December 1979.

7. The crime of torture made punishable pursuant to Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

8. The crimes defined by Article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988 and by Article 2 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988.

9. Crimes involving illicit traffic in narcotic drugs and psychotropic substances as envisaged by Article 3 (1) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 which, having regard to Article 2 of the Convention, are crimes with an international dimension.

Commentary

(1) The basis for the list of crimes in the Annex has been explained in the commentary to article 20 (e). Only treaties in force of universal (as distinct from regional) scope are included. Treaties which merely regulate conduct, or which prohibit conduct but only on an inter-State basis are not included. On this basis, the following treaties (listed in chronological order) are not included in the Annex:

- Regulations concerning the Laws and Customs of War on Land. Annexed to the Hague Conventions of 1899 and 1907 on the Laws and Customs of War on Land

  Reason: The Hague Regulations contain no provisions dealing with individual criminal responsibility. Most (though not all) of the violations of the laws and customs of war specified in the London Charter of 1945 are covered by the Geneva Conventions of 1949 and Additional Protocol I, which also provide for prosecution in the case of grave breaches. In addition, aspects of the Regulations fall within the notion of serious violations of the laws and customs applicable in armed conflict and are thus covered by article 20 (c) of the Statute.

- Convention on the Prevention and Punishment of the Crime of Genocide. New York, 9 December 1948
  Reason: Genocide within the meaning of the 1948 Convention is covered as a crime under general international law, and is the only crime within the inherent jurisdiction of the Court: see article 20 (a). Its inclusion in the Annex is thus unnecessary.
- Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954
  Reason: The Convention includes an undertaking by States parties to respect cultural property in time of armed conflict, unless military necessity imperatively demands otherwise (arts. 4 (1) and (2)), and to prohibit theft, pillage, misappropriation and vandalism of such property, and makes related provisions for its protection, including a system of special protection of particularly valuable items. It does not create crimes as such (cf. art. 8), does not extend State jurisdiction over acts contrary to the Convention, and contains no provisions for extradition. Nor does the Protocol of 14 May 1954, which deals with export of cultural property from occupied territory.
- Piracy, as defined by article 15 of the Convention on the High Seas, Geneva, 29 April 1958 and article 101 of the United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982
  Reason: Article 14 (1958) requires cooperation "to the fullest possible extent in the repression of piracy", defined in article 15 as consisting of certain "acts". Article 19 gives jurisdiction over piracy to any State which seizes a pirate vessel on the high seas or outside the jurisdiction of any State. Articles 100, 101, 105 (of the 1982 Convention) are identical in substance. These provisions confer jurisdiction only on the seizing State, and they cover a very wide range of acts. On balance the Commission decided not to include piracy as a crime under general international law in article 20.

- Single Convention on Narcotic Drugs. New York, 30 March 1961 (as amended by Protocol. Geneva, 25 March 1972)
  Reason: The Single Convention and Protocol regulate production and traffic in drugs. Article 36 requires each State party to make certain conduct unlawful under its national law, subject inter alia to "constitutional limitations" and to "domestic law". There are special provisions for extradition and an aut dedere aut judicare provision (art. 36 (a) (iv)). There is a case for inclusion in the Annex, but on balance the ground is covered by the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which is included in the Annex.
- Convention on Offences and Certain Other Acts committed on board Aircraft. Tokyo, 14 September 1963
  Reason: The Convention applies to offences against national penal law (including minor offences) as well as to conduct which may interfere with air safety whether or not it involves an offence. Its principal purpose is to establish flag State jurisdiction over crimes, etc. on board aircraft. The major terrorist offences against the safety of international civil aviation are covered by the Hague and Montreal Conventions, which are included in the Annex.
- Convention on Psychotropic Substances. Vienna, 21 February 1971
  Reason: The Convention is merely regulatory, and does not treat use or traffic in psychotropic drugs as a crime of an international character.
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction, 10 April 1972
  Reason: Article 4 provides for prohibition of development, etc. of such weapons within the jurisdiction of each State party, but the Convention does not create criminal offences or extend the jurisdiction of any State, and contains no provisions relating to extradition.
- United Nations Convention on the Prohibition of Military or any other Hostile Uses of Environmental Modification Techniques. New York, 10 October 1976

Reason: The Convention merely prohibits use of environmental modification techniques in certain circumstances (art. 4). It does not create crimes as such, does not extend State jurisdiction over acts contrary to the Convention, and contains no provisions for extradition.

- Protocol II Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts. Geneva, of 8 June 1977
  Reason: Protocol II prohibits certain conduct but contains no clause dealing with grave breaches, nor any equivalent enforcement provision.
- Convention on the Prohibition or Restriction of the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, 10 October 1980
  Reason: The Convention prohibits certain conduct but does not treat that conduct as criminal or require it to be suppressed by criminal sanctions.
- International Convention against the Recruitment, Use, Financing and Training of Mercenaries. New York, 4 December 1988
  Reason: Articles 2 to 4 create offences "for the purposes of the Convention". Articles 9 (2) and 12 in combination impose an aut dedere aut judicare obligation on all States parties. The Convention is excluded from the Annex because it is not yet in force. If it were to come into force before the Statute is adopted, consideration could be given to adding the Convention to the list. In that case the following additional paragraph would be appropriate: "(i) crimes related to mercenaries as defined by articles 2, 3 and 4 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989."

(2) In the case of the 1988 Narcotic Drugs Convention, the problems of limiting that Convention to individual crimes of substantial international concern is discussed in the commentary to Part 3. The Commission takes the view that only the offences referred to in article 3 (1) of the Convention should be included, and then only subject to the further qualification set out

in the Annex, referring to the purpose of the 1988 Convention as stated in article 2. Without such a limitation, article 3 (1) would cover too wide a range of cases to justify its inclusion.

Appendix I

POSSIBLE CLAUSES OF A TREATY TO ACCOMPANY THE DRAFT STATUTE

1. The Commission envisages that the Statute will be attached to a treaty between States parties. That treaty would provide for the establishment of the Court, and for the supervision of its administration by the States parties. It would also deal with such matters as financing, entry into force, etc., as is required for any new instrument creating an entity such as the Court.

2. The standard practice of the Commission is not to draft final clauses for its draft articles, and for that reason it has not sought to draft a set of clauses for a covering treaty which would contain clauses of that kind. However, in discussions in the Sixth Committee of the General Assembly, a number of the matters which it will be necessary to resolve in concluding such a treaty were discussed, and the Commission felt that it may be useful to outline some possible options for dealing with them.

3. Issues that will need to be dealt with include the following:

(a) Entry into force: The Statute of the Court is intended to reflect and represent the interests of the international community as a whole in relation to the prosecution of certain most serious crimes of international concern. In consequence, the Statute and its covering treaty should require a substantial number of States parties before it enters into force.

(b) Administration: The administration of the Court as an entity is entrusted to the Presidency: see article 8. However States parties will need to meet from time to time to deal with such matters as the finances and administration of the Court, and to consider periodic reports from the Court, etc. The means by which States parties will act together will need to be established,

(c) Financing: Detailed consideration must be given to financial issues at an early stage of any discussion of the proposed Court. There are essentially two possibilities: direct financing by the States parties or total or partial financing by the United Nations.
United Nations financing is not necessarily excluded in the case of a separate entity in relationship with the United Nations (e.g. the Human Rights Committee). The Statute is drafted in such a way as to minimize the costs of establishment of the Court itself. On the other hand, a number of members stressed that investigations and prosecutions under the Statute could be expensive. Arrangements will also have to be made to cover the costs of imprisonment of persons convicted under the Statute.

(d) Amendment and Review of the Statute: The covering treaty must of course provide for amendment of the Statute. It should in the Commission's view provide for a review of the Statute, at the request of a specified number of States parties after, say, five years. One issue that will arise in considering amendment or review will be the question whether the list of crimes contained in the Annex should be revised so as to incorporate new conventions establishing crimes. This may include such instruments in the course of preparation as the Draft Code of Crimes Against the Peace and Security of Mankind, and the proposed convention on the protection of United Nations peacekeepers.

(e) Reservations: Whether or not the draft Statute would be considered to be "a constituent instrument of an international organization" within the meaning of article 20 (3) of the Vienna Convention of the Law of Treaties, it is certainly closely analogous to a constituent instrument, and the considerations which led the drafters to require the consent of the "competent organ of that organization" under article 20 (3) apply in rather similar fashion to it. The draft Statute has been constructed as an overall scheme, incorporating important balances and qualifications in relation to the working of the Court: it is intended to operate as a whole. These considerations tend to support the view that reservations to the Statute and its accompanying treaty should either not be permitted, or should be limited in scope. This is of course a matter for States parties to consider in the context of negotiations for the conclusion of the Statute and its accompanying treaty.

(f) Settlement of disputes: The Court will of course have to determine its own jurisdiction (cf. arts. 24, 34), and will accordingly have to deal with any issues of interpretation and application of the Statute which arise in the exercise of that jurisdiction. Consideration will need to be given to ways in which other disputes, with regard to the interpretation and implementation of the Treaty embodying the Statute, arising between States parties, should be resolved.

Appendix II

Relevant treaty provisions mentioned in the Annex (see art. 20 (e))

1. Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the field, 12 August 1989

Article 50

Grave breaches to which the preceding article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

2. Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at sea of 12 August 1949

Article 51

Grave breaches to which the preceding article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

3. Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949

Article 130

Grave breaches to which the preceding article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

4. Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949

Article 147

Grave breaches to which the preceding article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

5. 1977 Protocol I additional to the 1949 Geneva Convention, and relating to the protection of victims of international armed conflicts

Article 85 - Repression of breaches of this Protocol

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this section, shall apply to the repression of breaches and grave breaches of this Protocol.

2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse party protected by articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse party and are protected by this Protocol.

3. In addition to the grave breaches defined in article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

(a) making the civilian population or individual civilians the object of attack;

(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in article 57, paragraph 2 (a) (iii);

(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in article 57, paragraph 2 (a) (iii);

(d) making non-defended localities and demilitarized zones the object of attack;

(e) making a person the object of attack in the knowledge that he is hors de combat;

(f) the perfidious use, in violation of article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

(a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of article 49 of the Fourth Convention;

(b) unjustifiable delay in the repatriation of prisoners of war or civilians;

(c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

(d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result, extensive destruction thereof, where there is no evidence of the violation by the adverse Party of article 53, subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;

(e) depriving a person protected by the Conventions or referred to in paragraph 2 of this article of the rights of fair and regular trial.

5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

6. Convention for the Suppression of Unlawful Seizure of Aircraft, the Hague, 16 December 1970

Article 1

Any person who on board an aircraft in flight:

(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act; or

(b) is an accomplice of a person who performs or attempts to perform any such act; or

commits an offence (hereinafter referred to as "the offence").

7. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971

Article 1

1. Any person commits an offence if he unlawfully and intentionally:

(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or

(b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or

(c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

(d) destroys or damages air navigation facilities or interferes with their operation, if any such act if likely to endanger the safety of aircraft in flight; or

(e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

2. Any person also commits an offence if he:

(a) attempts to commit any of the offences mentioned in paragraph 1 of this article; or

(b) is an accomplice of a person who commits or attempts to commit any such offence.

8. International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973

Article II

For the purpose of the present Convention, the term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:

(i) By murder of members of a racial group or groups;

(ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

(c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

(d) Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;

(e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

(f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

9. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, New York, 14 December 1973

Article 2

1. The intentional commission of:

(a) A murder, kidnapping or other attack upon the person or liberty of an internationally protected person;

(b) A violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty; and

(c) A threat to commit any such attack;

(d) An attempt to commit any such attack;

(e) An act constituting participation as an accomplice in any such attack;

shall be made by each State Party a crime under its internal law.

2. Each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature.

3. Paragraphs 1 and 2 of this article in no way derogate from the obligations of States Parties under international law to take all appropriate measures to prevent other attacks on the person, freedom or dignity of an internationally protected person.

10. International Convention against the Taking of Hostages, 17 December 1979

Article 1

1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.

2. Any person who:

(a) Attempts to commit an act of hostage-taking; or

(b) Participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking;

likewise commits an offence for the purposes of this Convention.

11. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

...

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

12. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988

Article 3

1. Any person commits an offence if that person unlawfully and intentionally:

(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

2. Any person also commits an offence if that person:

(a) attempts to commit any of the offences set forth in paragraph 1; or

(b) abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or

(c) threatens with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.

13. Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf, Rome, 10 March 1988

Article 2

1. Any person commits an offence if that person unlawfully and intentionally:

(a) seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation; or

(b) performs an act of violence against a person on board a fixed platform if that act is likely to endanger its safety; or

(c) destroys a fixed platform or causes damage to it which is likely to endanger its safety; or

(d) places or causes to be placed on a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety; or

(e) injures or kills any person in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (d).

2. Any person also commits an offence if that person:

(a) attempts to commit any of the offences set forth in paragraph 1; or

(b) abets the commission of any such offences perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or

(c) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b) and (c), if that threat is likely to endanger the safety of the fixed platform.

14. United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances - Vienna, 19 December 1988

Article 2

SCOPE OF THE CONVENTION

1. The purpose of this Convention is to promote cooperation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. In carrying out their obligations under the Convention, the Parties shall take necessary measures, including

legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.

2. The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

3. A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law.

Article 3

OFFENCES AND SANCTIONS

1. Each party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

(a) (i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;

(ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;

(iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in (i) above;

(iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

(v) The organization, management or financing of any of the offences enumerated in (i), (ii), (iii) or (iv) above;

(b) (i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences;

(c) Subject to its constitutional principles and the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences;

(ii) The possession of equipment or materials or substances listed in Table I and Table II, knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

(iii) Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly;

(iv) Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

Appendix III

Outline of possible ways whereby a permanent international criminal court may enter into relationship with the United Nations

1. The way in which a Permanent International Criminal Court may enter into relationship with the United Nations must necessarily be considered in connection with the method adopted for its creation.

2. In this respect, two hypotheses may be envisaged: (a) The Court becomes part of the organic structure of the United Nations; (b) The Court does not become part of the organic structure of the United Nations.

A. The Court becomes part of the organic structure of the United Nations

3. Under this hypothesis the Court, as a result of the very act of its creation, is already in relationship with the United Nations. This may be achieved in two ways:

I. The Court as a principal organ of the United Nations

4. This solution would attach the maximum weight to the creation of the Court by placing it on the same level with the other principal organs of the United Nations and, in particular, the International Court of Justice. It would also facilitate the *ipso jure* jurisdiction of the Court over certain international crimes. Under this solution, the financing of the Court would be provided for under the regular budget of the Organization.

5. On the other hand, this solution could give rise to potential obstacles in that it would require an amendment to the United Nations Charter under its Chapter XVIII (Arts. 108-109). It should be noted, in this connection, that there is no precedent for the creation of any additional principal organ in the history of the Organization.

II. The Court as a subsidiary organ of the United Nations

6. By contrast, there is a well-developed practice whereby United Nations principal organs create subsidiary organs under the relevant Charter provisions, (in particular Arts. 22 and 29 of the United Nations Charter), for the performance of functions conferred upon them or upon the Organization as a whole, by the Charter. There is practice along these lines even in the jurisdictional field. An early example is the establishment of the Administrative Tribunal of the United Nations, by General Assembly resolution 351 (iv) of 24 November 1949 (see document A/AC.65.2). A more recent example is the creation of the Tribunal for crimes committed in former Yugoslavia by Security Council resolution 827 of 25 May 1993 (document S/25704).

7. Normally and as concerns most fields of competence, the establishment of a subsidiary organ is essentially auxiliary in nature. The subsidiary organ's decisions will usually be in the nature of recommendations which the relevant principal organ is free to accept or reject.

8. In the judicial field, however, the subsidiary nature of an organ reflects itself mainly in the fact that its very existence, as well as the cessation of its functions, depends upon the relevant principal organ of the Organization. As regards the exercise of its functions, however, the very nature of the latter (judicial) makes them incompatible with the existence of hierarchical powers on the part of the principal organ which established the Court or Tribunal. Therefore, the principal organ has no power to reject or amend the decisions of the Tribunal or Court established. This was clearly ruled by the International Court of Justice as regards the Administrative Tribunal of the United Nations ("*Effect of awards of compensation made by the United Nations*

Administrative Tribunal" ICJ Reports, 1954, p. 62) and also arises from certain articles of the Statute of the Tribunal for former Yugoslavia (arts. 13, 15, 25, 26, etc.) (see also document S/25704, para. 28).

9. As regards financing, the activities of a subsidiary organ of the Organization are financed from United Nations sources, whether budgetary allocations, assessed contributions or voluntary contributions (see, as an example, General Assembly resolution 48/251 of 14 April 1994).

10. It should also be noted that, occasionally, the General Assembly has set up tribunals as subsidiary organs, on the basis of provisions contained in treaties concluded outside the United Nations. This was the case of the United Nations Tribunal for Libya and the United Nations Tribunal for Eritrea set up, respectively, by General Assembly resolutions 388 (V) of 15 December 1950 and 530 (VI) of 29 January 1952. Although the matters dealt with by these tribunals were, broadly speaking, part of the generic competence of the General Assembly under Article 10 of the United Nations Charter, the provision which led to their creation was contained in the Treaty of Peace with Italy, Annex XI, paragraph 3 (see document A/AC.65.2, sect. II).

11. The cases referred to in the preceding paragraph should be distinguished from those referred to in paragraphs 15 to 17 below in which the General Assembly undertakes certain functions with respect to organs established by the parties to a multilateral treaty.

B. The Court does not become part of the organic structure of the United Nations and is set up by a treaty

12. Under this hypothesis the Court would be created by a treaty binding on States parties thereto. There are two possible ways whereby such a Court could be brought into relationship with the United Nations: (I) by means of an agreement between the Court and the United Nations; (II) by means of a resolution of a United Nations organ (e.g. the General Assembly).

I. The Court comes into relationship with the United Nations by means of an agreement between the Court and the United Nations

13. Cooperation agreements are the typical way whereby specialized agencies and analogous bodies enter into relationship with the United Nations under Articles 57 and 63 of the United Nations Charter. Agreements are concluded between the specialized agency concerned and the Economic and Social Council of the United Nations and are subject to the approval of the General Assembly. The agreements regulate, *inter alia*, matters of collaboration with the United Nations in the respective fields of action of each specialized agency and questions related to a common system as regards personnel policies. Each specialized agency constitutes an autonomous international organization with its own budget and financial resources.

14. A case in point is article XVI of the Statute of the International Atomic Energy Agency, dealing with "Relationship with other organizations", which provides that the Board of Governors, with the

approval of the General Conference, is authorized to enter into an agreement or agreements establishing an appropriate relationship between the Agency and the United Nations and any other organizations the work of which is related to that of the Agency. The agreement regulating the relations between the Agency and the United Nations was approved by the General Assembly in resolution 1145 (XII) of 14 November 1957 and is annexed to that resolution. The agreement, inter alia, regulates the submission of reports by the Agency to the United Nations, the exchange of information and documents, matters of reciprocal representation, inscription of items in the respective agendas, cooperation with the Security Council and the International Court of Justice, coordination and cooperation matters, budgetary and financial arrangements and arrangements concerning staff.

15. The conclusion of an international agreement with the United Nations is also the way being envisaged by the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea to bring the projected tribunal into relationship with the United Nations. The final draft of that agreement (see document LOS/PCN.SCN.4/WP.16/Add.4) contemplates, inter alia, matters of legal relationship and mutual recognition, cooperation and coordination, relations with the International Court of Justice, relations with the Security Council, reciprocal representation, exchange of information and documents, reports to the United Nations, administrative cooperation and personnel arrangements. The draft agreement would also recognize "the desirability of establishing close budgetary and financial relationships with the United Nations in order that the administrative operations of the United Nations and the International Tribunal shall be carried out in the most efficient and economical manner possible, and that the maximum measure of coordination and uniformity with respect to these operations shall be secured".

II. The Court comes into relationship with the United Nations by means of a resolution of a United Nations organ

16. Finally, a Court created by a multilateral treaty could also be brought into relationship with the United Nations by means of a resolution of a United Nations organ. In the case of a Permanent International Criminal Court such a resolution could be adopted by the General Assembly, perhaps with the concurrent involvement of the Security Council.

17. It is in the field of the protection of human rights that international practice offers the most relevant examples of treaty organs coming into relationship with the United Nations by means of a General Assembly resolution. Typically, the treaty creating the organ already contains some provisions resorting to the United Nations Organization for the performance of certain functions under the treaty: e.g. the role of the United Nations Secretary-General in circulating invitations to States parties for the election of the treaty organ, request to the United Nations Secretary-General to provide the necessary staff and facilities for the effective performance of the functions of the treaty organ, etc. The United Nations, in its turn, takes such functions upon itself, by a resolution of the General Assembly which

"adopts and opens for signature and ratification" the multilateral convention in question. Such a procedure has been followed, for instance, in the case of the Human Rights Committee (General Assembly resolution 2200 (XXI) of 16 December 1966); the Committee on the Elimination of Racial Discrimination (General Assembly resolution 2106 (XX) of 21 December 1965) and the Committee against Torture (General Assembly resolution 39/46 of 10 December 1984).

18. The adoption of such resolutions will usually have financial implications for the United Nations, making necessary the intervention of the Fifth Committee in the decision-making process. For instance, in the case of the Human Rights Committee, the 1966 Covenant provides not only and inter alia, that "the Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present covenant" (art. 36), but also that "the members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions, as the General Assembly may decide, having regard to the importance of the Committee's responsibilities" (art. 35).

19. The conventions establishing the Committee on the Elimination of Racial Discrimination (art. 10 (3-4)) and the Committee against Torture (art. 18 (3)) also provide that the Secretariat of the Committees (staff and facilities) shall be provided by the Secretary-General of the United Nations, even though the Torture Convention provides that "the States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses such as the cost of staff and facilities incurred by the United Nations". Unlike the 1966 Covenant, however, these two conventions place upon the States parties and not upon the United Nations "the expenses of the members of the Committee while they are in the performance of their duties" (Racial Discrimination Convention, article 8 (6); Torture Convention, article 17 (7)).

20. In practice the General Assembly may accept, with regard to such committees created by treaty, additional obligations than those already contained in the treaties concerned. Thus, by resolution 47/111 of 16 December 1992, the General Assembly decided to "endorse the amendments to the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and request the Secretary-General to take the appropriate measures to provide for the financing of the committees established under the conventions from the regular budget of the United Nations, beginning with the budget for the biennium 1994-1995" (art. 9).

II. Draft Code of Crimes against the Peace and Security of Mankind

92. At the present session, the Commission had before it the twelfth report of the Special Rapporteur on the topic (A/CN.4/460 and Corr.1). It also had before it, in document A/CN.4/448 and Add.1, comments and observations

formulated by Member States, in response to the request made by the Commission at its forty-third session, on the draft Code of Crimes against the Peace and Security of Mankind, as adopted on first reading at that session. 45/

93. The Special Rapporteur noted, both in the introduction to the twelfth report and in submitting that report to the Commission, that it was intended for the second reading of the draft Code and focused only on the general part of the draft dealing with the definition of crimes against the peace and security of mankind, characterization and general principles.

94. He stated that part II of the draft Code, concerning the crimes themselves, would be dealt with in a new report at the Commission's next session and that he intended to limit the list of such crimes to offences whose characterization as crimes against the peace and security of mankind was hard to challenge.

95. In his twelfth report, the Special Rapporteur reproduced, article by article, the general part of the draft adopted on first reading, each article being followed by comments from Governments and then by the Special Rapporteur's opinion and conclusions and recommendations on each article.

96. The Commission considered the Special Rapporteur's twelfth report at its 2344th to 2347th, 2349th and 2350th meetings held from 27 May to 7 June 1994. After hearing the Special Rapporteur's presentation, the Commission considered draft articles 1 to 15, as dealt with in that report and decided at its 2350th meeting to refer them to the Drafting Committee, it being understood that the work on the draft Code and on the draft statute for an international criminal court should be coordinated by the Special Rapporteur on the draft Code and by the Chairman and members of the Drafting Committee and of the Working Group on a Draft Statute for an International Criminal Court.

97. The comments and observations of members of the Commission are reflected in paragraphs 98 to 209 below.

98. Some members expressed reservations about the current relevance of the title of the draft Code, pointing out that it might not be an exact reflection of the content that was to be given to the future instrument. It was appropriate for certain crimes, such as aggression, but was much more debatable for others, such as genocide or crimes against humanity which did

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45/ *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10* (A/46/10), chap. IV.

not come under the peace and security of mankind unless the concept was given a very broad meaning. With regard to the suggestion that the draft Code should be called the "code of international crimes", some members were of the opinion that such a title might create confusion with the crimes referred to in article 19 of Part One of the draft articles on State responsibility. Even the term "code" was questioned by some members. They considered that it should be followed by a generic expression to which, precisely, the Code was supposed to give content, since there could not be a code of some crimes only. However, other members pointed out that the word "code" was used in many areas, including technical fields, where the purpose was not necessarily to codify a topic as a whole.

99. It was generally agreed that the best course would be to wait and see what crimes would be included in the draft Code before deciding whether or not the title should be kept. It was nevertheless pointed out that the Commission itself could not change the title, since it was used in resolution 177 (II), of 21 November 1947 in which the General Assembly had given the Commission its mandate to prepare the draft Code.

100. Several members welcomed the Special Rapporteur's intention to limit the number of crimes solely to those offences whose character as a crime against the peace and security of mankind it was difficult to challenge. It was pointed out in that regard that States were generally reluctant to waive or surrender their criminal jurisdiction and it was only in connection with the most serious international crimes that States might be willing to accept the establishment of an international criminal court. It was also pointed out that that desirable limitation of the content of the draft Code would have a direct impact on the general part of the draft, inasmuch as the wording of certain provisions must necessarily be very different depending on whether the Code covered virtually all violations of international law or whether it would be limited to the "crimes of crimes", those that were the most serious and constituted either a breach of the peace or a violation of the very notion of humanity.

101. Still another opinion with regard to the scope of the list of crimes was that there were two obstacles to a substantial reduction in the number of crimes to be included. The first could derive from the statute for an international criminal court to the extent that this statute might envisage a very wide competence ratione materiae going beyond the list provided for by the Code. The second obstacle to a reduction in the number of crimes covered

by the Code derived from the nature of the protected interests which were those of mankind as a whole. It was difficult to determine and circumscribe in advance the acts which could affect such interests.

102. As to the scope of the draft Code ratione personae, the comment was made that the Code was intended to focus exclusively on crimes committed by individuals and thus did not provide for the direct or implied criminality of States. The emphasis in the draft Code on the role of State agents was welcomed because they, more than anyone else, were likely to be the perpetrators of crimes against the peace and security of mankind. However, it was noted that, at the beginning of the discussion on the Code, the Commission had planned to cover not only the criminal responsibility of individuals, but also the criminal responsibility of States; it had subsequently decided to focus solely on the former, leaving aside, but not completely excluding, the question of the criminal responsibility of States. It was noted in that regard that the problem of the link between the two categories of responsibility and, in particular, of the relationship between the draft Code and article 19 of Part One of the draft on State responsibility was bound to arise again and that the Commission would therefore have to give it some thought.

103. Some members pointed out that the question of penalties to be applied to the perpetrators of crimes covered in the draft Code had not yet been settled and that the Commission would have to take a decision on it. It was noted that the question of the interrelationship between the draft Code, the statute of the international criminal court and national courts should be clarified from the outset, since it would have important repercussions on the question of applicable penalties. If the Code was to be implemented by the proposed international criminal court, it would have to state specific penalties for each crime according to the principle nulla poena sine lege. On the other hand, if the Code was to be implemented by national courts of States or by both national courts and the international criminal court, the determination of penalties could be left to be decided by national law in the former case or to be dealt with by reference to national law in the latter.

104. With regard to the draft Code as it related to internal law, the opinion was expressed that it would be preferable if the convention through which the Code entered into force imposed the obligation on States parties to incorporate the Code in their respective legal systems. States, it was pointed out, should be unambiguously bound to graft the entire contents of the

Code into their respective systems of criminal law. In particular, it should be made clear that any State party whose legal system would not be in line with the code would be in breach of the convention instituting the Code. In that way, the primacy of the Code over internal law would be ensured in respect of States parties.

105. Some members stressed that the treaty by which States would become parties to the Code should provide for an appropriate procedure for the peaceful settlement of disputes. It was suggested that the Code should contain a suitable compromissory clause specifying the settlement procedure or procedures to which States in dispute should have recourse in the event of failure to settle a dispute by negotiation.

106. A large number of members of the Commission emphasized the need to ensure the necessary coordination between the provisions of the draft Code and those of the draft statute for an international criminal court. Although the two exercises should not be rigidly linked and the adoption of one of the instruments should not be contingent on the adoption of the other, there were inevitably provisions and problems common to the two drafts, particularly the general part of the draft Code. The necessary measures therefore had to be adopted to ensure that there was no contradiction between the articles common to the two drafts.

107. Some members, being of the view that there was a need for coordination between the draft Code and the draft statute, recommended that the two drafts be harmonized where they had aspects in common.

108. A discussion then took place in the Commission on the various articles of the draft Code which the Special Rapporteur had dealt with in his twelfth report.

109. With regard to draft article 1 on the definition of crimes against the peace and security of mankind, the text provisionally adopted by the Commission on first reading read:

> "The crimes [under international law] defined in this Code constitute crimes against the peace and security of mankind".

110. In his twelfth report, the Special Rapporteur indicated that the observations of Governments on that draft article had focused essentially on whether a definition by enumeration would suffice or whether there should be a general definition instead. In the Special Rapporteur's opinion, those observations showed that there was no agreement on any one method. He also noted that many penal codes contained no general definition of the concept of

crime. They merely enumerated the acts regarded as crimes, on the basis of the criterion of seriousness. In the light of the compromise formula proposed by one Government, however, he was prepared to propose a text that would contain a general or conceptual definition followed by a definition by enumeration that would not be limitative, but simply indicative. 46/

111. In the light of the replies of Governments, the Special Rapporteur had no objection to the deletion of the words "under international law" in square brackets in draft article 1 as provisionally adopted on first reading. The question whether or not those words should be retained in the text was, in his opinion, a purely theoretical one. Once the Code became an international instrument, the crimes defined in it would come under international criminal law derived from treaties.

112. Several members were of the opinion that, in order to serve some purpose, the definition of crimes against the peace and security of mankind in article 1 should contain a conceptual element characterizing the category of crimes in question. It was pointed out that such a definition would provide criteria for the establishment of the list of crimes. It was also pointed out that a conceptual definition would be even more necessary if the list was not exhaustive and was to be brought up to date from time to time. If the Commission did not lay down a general definition and gave only a list, the categories of crimes that could be included in the Code would be closed, something which would be most unfortunate. Thus, in the opinion of those members, a conceptual and general definition was virtually indispensable. In that connection, some members considered that the concept of seriousness was inseparable from a conceptual definition of the crimes to be covered.

113. Other members expressed reservations about a general or conceptual definition of crimes. It was asked whether it would really be possible to find a common denominator for all of the crimes. Moreover, such a definition

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46/ The new text of draft article 1 proposed by the Special Rapporteur reads as follows:

"Article 1. Definition

> 1. For the purposes of this Code, a crime against the peace and security of mankind is any act or omission committed by an individual which is in itself a serious and immediate threat to the peace and security of mankind and results in the violation thereof.
>
> 2. In particular, the crimes defined in this Code constitute crimes against the peace and/or security of mankind."

might create the risk that penalties would be applied to acts or omissions having no exact definition, and that would be at variance with the requirement of precision and rigour of criminal law and with the principle of nullum crimen sine lege. It was also pointed out that any general definition was bound to create difficulties with States in respect, for example, of aggression and terrorism. The various treaties that existed on extradition and conventions to combat terrorism always clearly stated which offences were punishable. In the view of those members, the Commission should not strive for a general wording to cover all of the crimes in the draft Code.

114. Some members found that the compromise proposal submitted by the Special Rapporteur in his twelfth report was interesting and worth taking into account.

115. Several members were of the opinion that there was no need for the words "under international law" contained in the draft article provisionally adopted on first reading. Some of them pointed out that it was not certain that all crimes enumerated in the draft Code were really crimes under international law.

116. In the view of other members, the words "under international law" might lead to interpretations introducing the idea of the criminal responsibility of States, which was outside the scope of the Code.

117. Still others agreed with the Special Rapporteur that the question was a purely theoretical one, bearing in mind that those words did not introduce anything new and that, once the Code was adopted, it would become a convention and the crimes defined in it would accordingly become international crimes.

118. With regard to draft article 2, entitled "Characterization", 47/ the Special Rapporteur noted in his twelfth report that it established the autonomy of international criminal law with regard to internal law. He pointed out that the fact that a crime was characterized as murder by the

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47/ Draft article 2 provisionally adopted by the Commission on first reading reads as follows:

"Article 2. Characterization

> The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization."

internal law of a State would not preclude the characterization of the same act as genocide on the basis of the Code, if the constituent elements of genocide were present.

119. However, since several Governments had stated in their written replies that the second sentence of draft article 2 was redundant and suggested that it should be deleted, the Special Rapporteur was prepared to consider its deletion.

120. Several members of the Commission, while favouring the draft article and the principle of the autonomy of international criminal law with regard to internal law, supported the deletion of the second sentence of the article, which they did not regard as really essential.

121. Other members were, however, of the opinion that the second sentence of the draft article should be retained. It was emphasized that the first and second sentences dealt with two different concepts - the characterization of the act, on the one hand, and the fact that it was or was not punishable, on the other.

122. Some members, while supporting the retention of draft article 2, considered that the Commission should avoid suggesting that there was a conflict between international law and internal law. Most of the crimes that the Commission had identified were punishable in the internal law of all States. The point was that the characterization provided for in the draft Code was independent of the characterization in the internal law of any given State. In that connection, it was suggested that the wording of the first sentence of draft article 2 should be amended to reflect the link that existed between the draft Code and the penal codes of all civilized States.

123. With regard to draft article 3, entitled "Responsibility and punishment", the text adopted by the Commission on first reading consisted of three paragraphs: the first two were retained by the Special Rapporteur in his new proposal (see footnote 48); according to paragraph 3:

> "An individual who commits an act constituting an attempt to commit a crime against the peace and security of mankind [as set out in arts. ...] is responsible therefor and is liable to punishment. Attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention".

124. In his twelfth report, the Special Rapporteur indicated that draft article 3 set forth the principle of international criminal responsibility of the individual, a principle accepted in international criminal law since the Judgment of the Nürnberg Tribunal. As to paragraph 3 of the article,

criticism with which he agreed had emphasized that attempt was not applicable to all crimes against the peace and security of mankind, such as threat of aggression. In some cases, attempt was expressly covered by existing conventions, e.g. the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. In the Special Rapporteur's opinion, instead of determining on a case-by-case basis the crimes to which the concept of attempt might apply, the draft Code should leave it to the competent courts to decide for themselves whether that characterization was applicable to the specific content of cases before them. He was therefore proposing a rewording of paragraph 3 under which an act would be punishable only if the court considered that it actually constituted an attempt. 48/

125. As regards the title of draft article 3, it was pointed out that the term "punishment" had a moral rather than legal connotation, which was not appropriate.

126. The content of paragraph 1 was generally well received.

127. As far as paragraph 2 was concerned, some members found its wording too vague and likely enormously to expand the category of persons who could be punished under the Code. For the crime of aggression, for example, every soldier would be punishable and that would not square with the principles of the law of war. In part II of the draft Code, great care had been taken in determining which persons were responsible for crimes and, in the opinion of those members, paragraph 2 should be recast to take into account each of the crimes enumerated in part II.

128. Paragraph 3, as amended by the Special Rapporteur, was found acceptable by some members.

48/ Draft article 3, as amended by the Special Rapporteur, reads as follows:

> "Article 3. Responsibility and punishment
>
> 1. An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment.
>
> 2. An individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor and is liable to punishment.
>
> 3. An individual who commits an act constituting an attempt to commit one of the acts defined in this Code is responsible therefor and is liable to punishment."

129. Other members had reservations about that paragraph and preferred the original version. It was pointed out that, while it was true that there could be no attempt to commit a threat of aggression, that was the only example the Special Rapporteur had given; that should therefore lead to a specific determination of the relevant crimes to which the concept of attempt did not apply. It was also stressed that the suggestion that the competent courts should have the right to decide for themselves whether the characterization of attempt was applicable to the specific content of cases before them might seem attractive, but, unlike criminal courts, which, in most legal systems, could interpret concepts in a broad sense, an international criminal court would have well-defined powers and it was not certain that States would want to give it a great deal of room to manoeuvre. With regard to the replacement of the words "crime against the peace and security of mankind" by the words "one of the acts defined in this Code", it was asked how that change might allay the concerns of those who deemed paragraph 3 very broad in scope.

130. Another suggestion on paragraph 3 was that it should be deleted and that the concept of attempt should be incorporated, without a definition, in paragraph 1 of the draft article, which might speak of "an individual who commits or attempts to commit ...". The components of the definition of attempt might be incorporated in the commentary to the draft article.

131. Some members considered that draft article 3, like draft article 2, should clearly indicate that the fact of not preventing the commission of a crime could also be a crime.

132. In the opinion of some members, draft article 3 should be brought more closely into line with article 7 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of Former Yugoslavia.

133. As regards draft article 4 on "motives", as provisionally adopted by the Commission on first reading, 49/ the Special Rapporteur noted in his twelfth report that it had prompted many reservations either because it was

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49/ Draft article 4 provisionally adopted by the Commission on first reading reads as follows:

"Article 4. Motives

> Responsibility for a crime against the peace and security of mankind is not affected by any motives invoked by the accused which are not covered by the definition of the crime."

considered to interfere with the rights of the defence or because it was considered that it would be better placed in the draft article on extenuating circumstances. The Special Rapporteur advised the deletion of the draft article.

134. Many members of the Commission supported the Special Rapporteur's proposal that draft article 4 should be deleted. It was pointed out that a distinction was usually drawn between motive and intent, or mens rea, with motive not forming part of the elements making up the offence. Thus, the characterization of motive was not very useful, for it came into play only in determining the degree of responsibility. Political motives usually worked to reduce the penalty normally assigned, for example, by preventing the death penalty from being imposed in criminal justice systems where it still existed. Those members were therefore of the opinion that draft article 4 should be deleted and its contents incorporated in the draft article on extenuating circumstances.

135. However, some other members considered that draft article 4 belonged in the draft Code and did not believe that motives could be incorporated in extenuating circumstances or in the category of exceptions. Some of those members emphasized in particular that persons who committed crimes against the peace and security of mankind should not be able to argue that they had done so for political reasons. They wanted that idea to be clearly brought out in the draft. It must be made clear that the motive, especially in connection with a political offence, would be disregarded when responsibility and punishment were determined.

136. As far as draft article 5 entitled "Responsibility of States", is concerned, 50/ the Special Rapporteur indicated in his twelfth report that it had not given rise to unfavourable observations on the part of the Governments which had commented on it. Those Governments all agreed that a State should be held internationally liable for damage caused by its agents as a result of a criminal act committed by them. The Special Rapporteur

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50/ Draft article 5 provisionally adopted by the Commission on first reading reads as follows:

"Article 5. Responsibility of States

Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it."

explained that a single criminal act often had dual consequences: criminal consequences, namely, the penalty imposed on the perpetrator, and civil consequences, namely, the obligation to compensate for the damage. Very often, the perpetrators of the crimes under consideration were agents of a State acting in an official capacity. In such cases, State responsibility in the classical sense of the term had to be determined, especially as the scope and extent of the damage far exceeded the resources for reparation available to the agents of the State who committed the crimes. The Special Rapporteur therefore proposed that the draft article should be retained.

137. Several members of the Commission supported draft article 5 as adopted on first reading and the proposal by the Special Rapporteur that it should be retained. In that connection, it was pointed out that the article embodied the very sensible and fundamental principle that the international criminal responsibility of the individual should not exclude the international responsibility of the State for a crime against the peace and security of mankind. It was also recalled that that principle had been enshrined in treaties, including article IX of the 1948 Convention on Genocide.

138. Some members supported the underlying principle of draft article 5, but found that its wording was not very felicitous and could be improved. It was pointed out that the draft article had to be read in conjunction with some articles of the draft on State responsibility, namely, articles 5 and 8 of Part One and article 10, paragraph 2 (b), of Part Two. However, in the opinion of some members, the present wording of the draft article seemed to rule out the existence of any link between the criminal responsibility of an individual and the responsibility of the State. Although a distinction had to be made between those two concepts, it must not be forgotten that there was sometimes an overlap between them. For example, according to article 10, paragraph 2, of Part Two of the draft on State responsibility, one of the elements of satisfaction was the criminal prosecution of the individuals whose conduct had been at the origin of the internationally wrongful act of the State. However, satisfaction did not relieve the State of other possible consequences of the crime, such as reparation. It was therefore suggested that the draft article should clearly state that "The prosecution of an individual for a crime against the peace and security of mankind shall be without prejudice to any responsibility of the State under international law".

139. Furthermore, while some members considered that the wording of the article might be improved to avoid any confusion with the concept of criminal

responsibility of the State, other members found that the present wording offered the advantage of not necessarily ruling out that concept in case it should be recognized in future.

140. With regard to draft article 6 entitled "Obligation to try or *extradite", [51] the Special Rapporteur indicated in his twelfth report* that, in their written replies, Governments did not challenge the principle set forth in article 6, but were concerned at how it might be applied. A first comment related to the guarantees to be provided to the accused whose extradition was being requested. The Special Rapporteur stressed that the point had been dealt with carefully in the report of the Working Group on the Draft Statute for an International Criminal Jurisdiction annexed to the report of the Commission on the work of its previous session [52] and in his opinion the formula proposed in that context might be used in the draft Code. A second comment by Governments had to do with the scope of the rule set forth in draft article 6. According to some States, the rule should apply only to States parties to the Code. The Special Rapporteur thought that that view deserved favourable consideration. He indicated that a third point made by Governments concerned the order of priority to be assigned to requests for extradition when there were several of them. In the Special Rapporteur's view, although the principle of territoriality of criminal law was unanimously accepted and, accordingly, the request of the State where the crime was committed must in principle have priority, nevertheless the rule should not be considered absolute. As pointed out by some Governments, the rule gave rise

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[51] Draft article 6 provisionally adopted by the Commission on first reading reads as follows:

> "Article 6. Obligation to try or extradite
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> 1. A State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him.
>
> 2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.
>
> 3. The provisions of paragraphs 1 and 2 do not prejudge the establishment and the jurisdiction of an international criminal court."

[52] Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10).

to reservations when the State where the crime was committed bore some responsibility in its commission. The Special Rapporteur thought that the rule might also prompt reservations if an international criminal court existed. He also asked whether a request by a State in whose territory the crime was committed could have priority over a request by an international criminal jurisdiction. In his opinion, the answer must be in the negative.

141. Some members approved without reservation the present wording of paragraph 1 of the draft article. Some other members, while basically endorsing the principle embodied in paragraph 1, wondered whether it had been drafted in the best possible way. It was pointed out in that connection that the wording of the various treaties and conventions on universal jurisdiction in force was quite varied and that it would be necessary to make a systematic study to see what the common denominators were. The present terms of paragraph 1 seemed inconsistent with the wording found in model texts. For example, article 7 of the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents stipulated that, if the State party did not extradite the alleged offender, it must submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Draft article 6 of the draft Code, on the other hand, merely said that the State must either try or extradite the alleged perpetrator of a crime. In the view of these members, the formulation of draft article 6 should therefore be brought into line with the wording in other texts.

142. With regard to the scope ratione personae of the principle set forth in paragraph 1, it was open to question whether that principle must be applied only to States parties to the Code or to all States. It was observed that, if the Code became a convention, the theoretical reply to the question would need to be assessed in the light of the relevant provisions of the 1969 Convention on the Law of Treaties and, in particular, of its articles 34, 35, 38 and 43. It would thus be necessary to establish to what extent the principle aut dedere aut judicare had gained acceptance as a customary rule binding on States not parties to the Code. From a practical standpoint, not to concede that the scope of that principle was erga omnes would amount to a weakening of the system of the Code.

143. With regard to paragraph 2 of the draft article, several members, while recognizing the importance which normally attached to the criterion of territoriality in matters of extradition, stated reservations about the

priority which paragraph 2 seemed to accord in the extradition process to the State in whose territory the crime was committed. It was argued in that connection that such priority might result in the extradition of an alleged criminal to the State whose responsibility was also established by the act of the individual and that this, in turn, might lead to accommodating judgments. In other cases, such extradition might lead to judgments prompted more by revenge than by a concern for justice.

144. Some members nevertheless observed that the rule set forth in paragraph 2 was not absolute and that the wording provided merely that "special consideration shall be given" to a request from the State in whose territory the crime was committed. It was pointed out that that flexibility could be enhanced by replacing the words "shall be given" by "may be given".

145. It was stated that paragraph 3 and some aspects of the article as a whole should be amended in the future in the light of the adoption of the statute for an international criminal court. It was observed that the article should include a provision similar to the one contained in article 63 of the draft statute for an international criminal court annexed to the report of the Commission on the work of its previous session 53/ concerning the surrender of an accused person to the court. It was suggested that the draft article should state clearly that the international court would have priority in the event of several requests for extradition or surrender of an accused person.

146. With regard to the guarantees to be provided to an accused person whose extradition was requested, some members suggested using in the draft Code the wording adopted in the draft statute for an international criminal court annexed to the report of the Commission on the work of its previous session.

147. With regard to draft article 7 on the non-applicability of statutory limitations, 54/ the Special Rapporteur pointed out in his twelfth report that the written comments received from Governments demonstrated that the rule of the non-applicability of statutory limitations was not universally accepted

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53/ Ibid.

54/ Draft article 7 provisionally adopted by the Commission on first reading reads as follows:

"Article 7. Non-applicability of statutory limitations

No statutory limitation shall apply to crimes against the peace and security of mankind."

by States. That rule had emerged only after the Second World War, on the initiative of the United Nations, in the form of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968 and General Assembly resolution 3074 (XXVIII) of 3 December 1973 concerning the principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity; paragraph 1 of the resolution stated that such crimes must be prosecuted "whenever committed". The Special Rapporteur also emphasized that those instruments were, however, limited in scope, since they covered only war crimes and crimes against humanity. It seemed to him difficult to extend the rule to all other crimes covered by the Code. In the circumstances, he considered that the draft article concerning the non-applicability of statutory limitations to the crimes covered by the Code should be deleted. Only general rules applicable to all crimes against the peace and security of mankind should be included in the Code and the rule set forth in draft article 7 did not appear to be applicable to all the crimes listed in the Code, at least according to the terms of existing conventions.

148. Some members of the Commission supported the Special Rapporteur's solution of deleting draft article 7. It was pointed out in that connection that the rule of the non-applicability of statutory limitations could not be applied to all the crimes covered in the Code and that draft article 7 dealt with a question that basically had to be decided by Governments in view of the various elements that they had to take into account when making general policy decisions. The fact that fewer than 30 States had ratified the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity clearly showed that Governments were hardly inclined to accept provisions regulating in advance and in a standard manner issues which were basically part of their general policy.

149. It was also pointed out that an absolute rule of the non-applicability of statutory limitations could, in certain cases, hamper reconciliation between two communities that might have been at odds in the past or even hamper amnesty granted by a Government with the democratically expressed consent of a national community with a view to the definitive restoration of internal peace.

150. The question was asked whether there was any point in bringing to justice the perpetrator of a crime against the peace and security of mankind 30 or 40 years after the crime had been committed. All kinds of difficulties could

arise after such an interval. A compromise solution might be to provide that time would cease to run for so long as there were factual grounds for not initiating criminal proceedings, for instance, for the whole period during which criminals who could be prosecuted under the provisions of the Code were in power in a country.

151. Some members thought that, instead of the non-applicability of statutory limitations, provision should be made for a period of prescription which was sufficiently long in relation to the gravity of the crimes included in the draft Code.

152. However, other members thought that the rule of the non-applicability of statutory limitations belonged in the draft Code since the moral and legal philosophy of the instrument was based on the fundamental concept of most serious crimes and on the need to draw the strictest conclusions, both legal and practical, from that concept. That was why some of these members believed that the question of the scope of the principle of the non-applicability of statutory limitations depended to a large extent on the content of the draft Code, which ought to treat as crimes the truly most serious crimes or "crimes of crimes" to which the principle of the non-applicability of statutory limitations might reasonably be applied. Otherwise, the scope of draft article 7 would have to be reduced and apply only, for instance, to crimes against humanity and war crimes.

153. Lastly, some members who favoured the principle of the non-applicability of statutory limitations to crimes against the peace and security of mankind thought that the effects of that rule might be eased, for humanitarian reasons or reasons of national reconciliation, by providing for the possibility that a convicted person might be eligible for pardon, parole or commutation of sentence.

154. Commenting jointly on draft article 8 (Judicial guarantees), draft article 9 (Non bis in idem) and draft article 10 (Non-retroactivity), several members emphasized both their importance and the need for coordination between those provisions of the draft Code and the ones dealing with the same matters in the draft statute for an international criminal court.

155. With regard to draft article 8 (Judicial guarantees), the Special Rapporteur indicated in his twelfth report that the draft article had garnered a broad consensus, especially since it conformed to the provisions of the

Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. He therefore proposed to retain it. 55/

156. Several members of the Commission expressed their agreement with the existing wording of article 8 which, it was said, set forth the minimum guarantees to which any accused person must be entitled, and which constituted one of the fundamental rules of international law and of human rights instruments.

55/ Draft article 8 provisionally adopted by the Commission on first reading reads as follows:

"Article 8. Judicial guarantees

An individual charged with a crime against the peace and security of mankind shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to both the law and the facts. In particular:

1. He shall be presumed innocent until proven guilty.

2. He has the right:

(a) in the determination of any charge against him, to have a fair and public hearing before a competent, independent and impartial tribunal duly established by law or by treaty;

(b) to be informed promptly and in detail, in a language that he understands, of the nature and cause of the charge against him;

(c) to have sufficient time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) to be tried without undue delay;

(e) to be present at his trial and to defend himself in person or through legal assistance of his own choosing; to be informed if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him in any such case if he does not have sufficient means to pay for it;

(f) to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(g) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(h) not to be compelled to testify against himself or to confess guilt."

157. It was also remarked that a balance should be maintained between the judicial guarantees offered to the accused and the security of the international community.

158. With regard to article 9 (Non bis in idem), the draft article provisionally adopted on first reading provided that no one should be tried or punished for a crime under the Code for which he had already been finally convicted or acquitted by an international criminal court. Paragraph 2 of the draft article established the same principle with regard to a final conviction or acquittal by a national court, but subject to numerous exceptions set forth in paragraphs 3 and 4 of the article, namely: (a) if the act which had been the subject of trial and judgment as an ordinary crime corresponded to one of the crimes characterized in the Code; (b) if the act which had been the subject of the national judgment had taken place in the territory of the State whose court intended to try the act a second time; and (c) if that State had been the main victim of the crime. The draft article provided, however, that in the case of a subsequent conviction, the second court, in passing sentence, should deduct any penalty imposed and served as a result of a previous conviction for the same act.

159. In his twelfth report, the Special Rapporteur observed that Governments had entered many reservations to this draft article; he attributed them to the fact that the draft article represented a compromise between two conflicting schools of thought, one favourable and the other opposed to the incorporation of the principle in the draft Code.

160. In the opinion of the Special Rapporteur, the non bis in idem principle was applicable on the assumption that an international tribunal existed which had concurrent jurisdiction with national jurisdictions, since it would destroy the authority of the international court if national courts had jurisdiction over cases already tried under that international jurisdiction. On the other hand, if no international criminal tribunal existed, the Special Rapporteur would find it much more difficult for the non bis in idem principle to be applied to decisions already handed down by a national court. He had therefore proposed, in his revised draft article 9, that the application of the non bis in idem principle should be confined to the situation in which an

international criminal tribunal existed. 56/ He had modelled the wording of his new draft article on article 10 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia.

161. Some members of the Commission directed their comments towards draft article 9 as adopted on first reading. They expressed doubts on the compatibility of that draft article, and particularly paragraphs 3 and 4 thereof, with article 14 of the International Covenant on Civil and Political Rights and with the corresponding provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

162. Referring to the new formulation of draft article 9 proposed by the Special Rapporteur, several speakers welcomed the fact that he excluded the possibility of States having a case tried by their own courts where it had already been tried by an international court. It was pointed out in this connection that, on the basis of a close study, it had been concluded that, under existing positive law, the non bis in idem principle applied only within a given legal system so that proceedings taken in another State, on the same facts, were not precluded. In that connection, it was remarked that the

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56/ The revised draft article 9 proposed by the Special Rapporteur reads as follows:

> "Article 9. Non bis in idem
>
> 1. No person shall be tried before a national court for acts constituting crimes against the peace and security of mankind for which he or she has already been tried by an international tribunal.
>
> 2. A person who has been tried by a national court for acts constituting crimes against the peace and security of mankind may be subsequently tried by the International Tribunal only if:
>
> (a) the act for which he or she was tried was characterized as an ordinary crime and not as a crime against the peace and security of mankind;
>
> (b) the national court proceedings were not impartial or independent or were designed to shield the accused from international criminal responsibility, or the case was not vigorously prosecuted.
>
> 3. In considering the penalty to be imposed on a person convicted of a crime under the present Code, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served."

principle was relative when it authorized a retrial in cases where the higher interests of justice so required, where new facts favourable to the convicted person came to light and where the court which had tried the case had failed to show impartiality or independence. Those members therefore approved the approach taken by the Special Rapporteur in limiting the application of the principle solely to the circumstances in which an international criminal court existed, and they found the new formulation based on article 10 of the Statute of the International Tribunal for the former Yugoslavia acceptable.

163. Some members nevertheless expressed reservations concerning the inclusion in the draft Code of provisions analogous to those appearing in the Statute of the Tribunal for the former Yugoslavia. The Tribunal, they said, had been set up by a resolution of the Security Council which provided for measures that were binding on all States Members of the United Nations to maintain peace and security in the region, whereas the draft Code and the draft statute for an international criminal court were addressed only to States that would become parties to them on a voluntary basis. Those members therefore considered that it would be difficult to apply the non bis in idem principle at the international level, since States were generally reluctant to accept the jurisdiction of an international court except in cases where, in view of the seriousness of the crimes, exclusive jurisdiction should be conferred on an international court.

164. Some members thought that the new text proposed by the Special Rapporteur failed to resolve the complex problems created by the non bis in idem principle, since the reference to ordinary crimes and fake trials in paragraph 2 posed serious questions.

165. With regard to draft article 10, on non-retroactivity, the Special Rapporteur observed in his twelfth report that the text had given rise to virtually no objections. Paragraph 1, he pointed out, reaffirmed a basic principle of criminal law, while paragraph 2 merely reproduced article 11 of

the Universal Declaration of Human Rights and article 15, paragraph 2, of the International Covenant on Civil and Political Rights. He therefore proposed that the article should be retained. 57/

166. Several members expressed their agreement with the existing wording of the article, which they supported on the basis of the considerations set forth by the Special Rapporteur in his twelfth report. It was pointed out that the law could have no retroactive effect except when it benefited the accused person.

167. In connection with draft article 11, entitled "Order of a Government or a superior", the Special Rapporteur observed in his twelfth report that the principle embodied in this draft provision had already been affirmed in the "Principles of international law recognized in the Charter and Judgment of the Nürnberg Tribunal" (principle IV). The Commission, he said, had merely replaced the expression "provided a moral choice was in fact possible to him" by the expression "if, in the circumstances at the time, it was possible for him not to comply with that order". In the opinion of the Special Rapporteur, that principle should not be called into question without good reason and he therefore proposed that the draft article should be retained. 58/

168. Some members expressed reservations about the draft article and made suggestions for improving its wording. For example, it was remarked that, as

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57/ Draft article 10 provisionally adopted by the Commission on first reading reads as follows:

"Article 10. Non-retroactivity

1. No one shall be convicted under this Code for acts committed before its entry into force.

2. Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law."

58/ Draft article 11 provisionally adopted by the Commission on first reading reads as follows:

"Article 11. Order of a Government or a superior

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility if, in the circumstances at the time, it was possible for him not to comply with that order."

currently formulated, the article was likely to pose serious problems because there was no connection between the order from a Government or from a superior and the question of guilt. To suggest otherwise would be to ignore general principles of law and practice. It was suggested that the part of the sentence following the words "criminal responsibility" should be deleted. It was also remarked that the General Assembly had not actually "adopted" the Nürnberg principles but had only taken note of them. Another suggestion was to qualify the wording "possible" in the draft article, perhaps by the word "really" or the word "morally".

169. In the opinion of other members, the Commission should revert to the clause contained in Nürnberg principle IV and word the article as follows: "The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of moral responsibility under international law, provided a moral choice was in fact possible to him".

170. In regard to draft article 12, "Responsibility of the superior", the Special Rapporteur observed in his twelfth report that the provision established a presumption of responsibility on the part of the superior for crimes committed by his subordinates. That presumption of responsibility derived from the jurisprudence of the international military tribunals established after the Second World War to deal with crimes committed during the war, to which the Special Rapporteur had referred at some length in his fourth report. The jurisprudence was based on a presumption of responsibility on the part of the superior owing to negligence, failure to supervise or tacit consent, all of which were faults that made the superior criminally responsible for crimes committed by his subordinates. He proposed that the draft article should be retained. 59/

59/ Draft article 12 provisionally adopted by the Commission on first reading reads as follows:

"Article 12. Responsibility of the superior

> The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime."

171. Some members considered that the draft article was sound and that it should be retained as it stood.

172. Other members, while expressing the view that the general idea reflected in the draft article was acceptable, believed that its wording raised a number of problems. They observed that the phrase "if they knew or had information" introduced a notion which was correct but was, perhaps, stated rather too simplistically. Those members thought that the specific criteria according to which a superior could be regarded as responsible for an act should be spelled out, since the article as it stood imposed a very heavy responsibility on the superior. They also observed that the concept of presumption of responsibility referred to by the Special Rapporteur in his twelfth report warranted further consideration, bearing in mind the rule stated in draft article 8 concerning the presumption of innocence. In addition, it was suggested that the Commission should consider the sources of the draft article.

173. With regard to draft article 13, entitled "Official position and responsibility", the Special Rapporteur, in his twelfth report, stated that although it was difficult to provide in detail for the various cases in which heads of State or Government should be prosecuted, what could be said was that whenever a head of State or Government committed a crime against the peace and security of mankind, he should be prosecuted. The Special Rapporteur proposed that draft article 13 should be retained as it stood. 60/

174. The proposal to retain draft article 13 unchanged was generally welcomed in the Commission. It was remarked in this connection that the draft article was based directly on principle III of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.

175. Furthermore, it was observed that the draft article entirely excluded immunity arising out of the official status of the person who committed a

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60/ Draft article 13 provisionally adopted by the Commission on first reading reads as follows:

"Article 13. Official position and responsibility

The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility."

crime against the peace and security of mankind and that some thought should perhaps be given to the question of the immunity which the leaders of a State might enjoy with regard to judicial proceedings.

176. In regard to draft article 14, entitled "Defences and extenuating circumstances", the provision adopted on first reading consisted of two paragraphs. The first provided that the competent court should determine the admissibility of defences under the general principles of law in the light of the character of each crime. The second paragraph provided that, in passing sentence, the court should, where appropriate, take account of extenuating circumstances.

177. The Special Rapporteur, in his twelfth report, expressed agreement with those Governments which, in their written responses, had considered that the concept of defences and that of extenuating circumstances should be dealt with separately. The two concepts, the Special Rapporteur said, were not in the same category. While defences stripped an act of its criminal character, extenuating circumstances did not remove that criminal character, but merely reduced the offender's criminal responsibility. In other words, defences related to the existence or non-existence of a crime, extenuating circumstances related to the penalty. The Special Rapporteur also shared the view that defences, because they sought to prove that no crime existed, should be defined in the Code in the same way that crimes were defined in the Code according to the *nullum crimen sine lege* principle. He therefore proposed a new draft article 14 to deal with the issue of defences, namely, self-defence, coercion and state of necessity. [61]

178. The Special Rapporteur explained that the self-defence referred to here was not the self-defence provided for in Article 51 of the Charter of the United Nations. Article 51 removed the wrongfulness of a specific act and therefore exempted the State committing that act from international responsibility. However, because self-defence constituted an exception to the international responsibility of the State, it also relieved the leaders of that State of international criminal responsibility for the act concerned. As

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[61] The new draft article 14 proposed by the Special Rapporteur reads as follows:

> "Article 14. Self-defence, coercion and state of necessity
>
> There is no crime when the acts committed were motivated by self-defence, coercion or state of necessity."

for the concepts of coercion and state of necessity, the judicial precedents of the International Military Tribunals established by the Charter of the Nûrnberg Tribunal of 8 August 1945 and by Law No. 10 of the Control Council for Germany had admitted those concepts with the following reservations and conditions: (a) coercion and state of necessity must constitute a present or imminent danger; (b) an accused person who invokes coercion or state of necessity must not have helped, by his own behaviour, to bring about coercion or the state of necessity; and (c) there should be no disproportion between what was preserved and what was sacrificed in order to avert the danger. The Special Rapporteur also observed that this judicial practice, which had its origins in Anglo-American law, made no distinction between coercion and state of necessity.

179. The idea of dealing with defences in a separate article was generally welcomed in the Commission.

180. Criticism was nevertheless directed towards the wording of the new draft article 14 proposed by the Special Rapporteur. It was said that the new text was an oversimplification of the previous text and was likely to give rise to a regrettable confusion between self-defence in the case of an individual and that provided for in Article 51 of the Charter. Possible confusion between those two types of self-defence might well lead to serious consequences and made it necessary to clarify the text. It was also remarked that none of the defences mentioned in the draft article could justify an act such as genocide and that the starkness of the text might suggest that such crimes were justifiable. It was suggested that the ambiguity of the article might be lessened somewhat by embodying in the article the conditions for its invocation mentioned by the Special Rapporteur in the body of his report (see para. 178 above). The Commission should, it was said, formulate a more specific text on self-defence, coercion and necessity, otherwise the defences would not be of much practical value to the accused.

181. It was further remarked that the draft article proposed by the Special Rapporteur should be split into two, as two different concepts were involved. An act done under self-defence was not illegal, whereas, in the case of coercion and state of necessity, fault was removed but not wrongfulness. Also, it was suggested that the defence of mistake should have a place in the draft, even though it was unlikely to be invoked frequently in a Code of Crimes against the Peace and Security of Mankind. "Insanity" and "consent"

were also mentioned as defences which the Commission might consider in order to decide whether it would be advisable to include them in the draft Code.

182. In addition, some members expressed a certain reluctance to accept the idea that defences should exist for crimes as serious as crimes against the peace and security of mankind.

183. The Special Rapporteur pointed out that in the new draft article which he had proposed in his twelfth report, the word "defences" had been eliminated from the title of the draft article.

184. With regard to the new draft article 15, 62/ "Extenuating circumstances", which the Special Rapporteur had proposed in his twelfth report, he said it was generally admitted in criminal law that any court hearing a criminal case was entitled to examine the circumstances in which an offence had been committed and to determine whether there were any circumstances that diminished the responsibility of the accused. Furthermore, the Special Rapporteur did not believe it appropriate to discuss aggravating circumstances, since the crimes considered here were deemed to be the most serious of the most serious crimes. He said, however, that the question was one for the Commission to decide.

185. Several members expressed approval for including a special provision on extenuating circumstances in the Code. It was pointed out in this connection that, in English, the word "mitigating" would be preferable to the word "extenuating".

186. On the question of "insanity", which had been cited by some Governments as an extenuating circumstance, it was remarked that such a defence threatened to make the Code meaningless, since the perpetrators of such horrible crimes could all be considered insane.

187. It was also suggested that draft article 15 should be harmonized with the corresponding provision of the draft statute for an international criminal court and that it should be considered in conjunction with the question of penalties.

62/ The new draft article 15 proposed by the Special Rapporteur in his twelfth report reads as follows:

"Article 15. Extenuating circumstances

When passing applicable sentences, extenuating circumstances may be taken into account by the court hearing the case."

188. The remark was made that, in the event of the Code being applied by national jurisdictions, one easy solution would be to rely on the national legislations concerned in order to ascertain what the extenuating circumstances were.

189. In this connection, some members were of the opinion that, since extenuating circumstances were a matter for the sentencing judge, draft article 15 had no purpose.

190. Other members, however, thought that draft article 15 should deal with aggravating circumstances as well as extenuating circumstances.

191. At the conclusion of the discussion of his twelfth report, the Special Rapporteur summarized the main ideas that had emerged during the debate and gave his opinion on some of the points raised.

192. As far as the title of the draft Code was concerned, the Special Rapporteur believed that the subject continued to be topical, judging by recent events in the former Yugoslavia, Rwanda and other countries, where crimes against humanity and war crimes were still being committed. He did not see how the title could be changed. The wording "Code of International Crimes" would be too broad, because the draft Code was restricted to the most serious crimes that constituted a danger for mankind and universal civilization.

193. With regard to draft article 1 (Definition), he had explained in a number of previous reports why the Commission had adopted a definition of crimes by enumeration rather than a general definition. Nevertheless, some members of the Commission still favoured a general, or conceptual, definition. He had no objection to that, but for the past 13 years not one general definition had been proposed, and he himself could not suggest one. An enumeration was a valid definition too. One Government had suggested a general definition followed by an indicative, and not limitative, enumeration. He liked that idea and had espoused it, but he was also open to other proposals.

194. In regard to draft article 2 (Characterization), the Special Rapporteur said that it confirmed the independence of international law as opposed to internal law. While there was general agreement on the first sentence, the second sentence ("The fact that an act or omission is or is not punishable under internal law does not affect this characterization") had met with opposition, some members of the Commission contending that it was redundant and did not add anything new. The Special Rapporteur indicated that since the second sentence explained and underpinned the first sentence, he was in favour

of keeping it. He said that once it was admitted that international criminal law was a separate science, it must be possible to characterize the acts punished under that law. Characterization was usually a matter for the court. When someone accused another of a particular act, he did not have to characterize the act, but simply to describe the facts he was alleging. The court must characterize the act and decide which crime under the Code corresponded to that act. That was sometimes very difficult.

195. With regard to draft article 3 (Responsibility and punishment), the Special Rapporteur said it was not enough to find that a crime had been committed: the link between the act and the perpetrator's responsibility must also be established. A number of members had contested the use of the word "punishment" and proposals had been made to replace it by a more appropriate term. He would abide by the Drafting Committee's decision.

196. The concept of "attempt" in paragraph 3 had been discussed at some length. He had been asked which crimes under the Code could be the object of an attempt and which could not, but unfortunately he could not draw such a distinction in advance. In his opinion, engaging in such an exercise was pointless, as it was a matter for the courts to decide.

197. Draft article 4 (Motives), was difficult and the Special Rapporteur did not see why the draft Code should devote a separate article to the subject. Motives varied greatly. Crimes could be committed for money, but also out of pride and even for more noble sentiments, such as honour or love. The members of the Commission had thought that the subject might be treated under draft article 14, on defences and extenuating circumstances, and he had therefore asked for draft article 4 to be deleted, especially as it was confusing, complicated and superfluous in its present form.

198. It had been argued that draft article 5 (Responsibility of States) was incomplete, and he acknowledged that it was limited to crimes committed by representatives of a State. When a State official committed a wrongful act, the State was usually held responsible for that act. Some members of the Commission believed that the State could not always be held responsible, because certain individuals committed acts independently of the State. Although that was true, he had in mind the authors of a crime who were connected with the State in one form or another. Individuals could sometimes commit very serious international crimes without having any apparent link to a State. For example, some terrorist groups might have no visible link to a State. But even in that case, the State might still have special obligations:

terrorists did not act in a vacuum. It was difficult to conceive how terrorist groups present in one State could commit serious crimes in another State without the first State being involved. If a State had a sound security system, it could not ignore the presence in its territory of terrorist groups that were fomenting crimes against the territory of another State. Article 7 of the Draft Declaration on Rights and Duties of States, adopted by the Commission in 1949, provided that every State had the duty to ensure that conditions prevailing in its territory did not menace international peace and order. Whenever a crime was committed against the peace and security of mankind, there was a State behind it, either through negligence or complicity. In any event, the Special Rapporteur opted for retaining draft article 5 as it stood, because it was confined to the responsibility of States for the acts of its officials.

199. The Special Rapporteur added that the question of the criminal responsibility of States had been constantly raised, even where it was inappropriate. Draft article 5 covered the responsibility of the State resulting from acts committed by its officials. Some members had interpreted that article to mean that States must be held criminally responsible. He was not a partisan of criminal State responsibility, for reasons that he had evoked on a number of occasions. Moreover, neither draft article 19 of Part One of the draft on State responsibility nor the commentary thereto referred to criminal State responsibility. The Special Rapporteur did not see how a State could incur criminal responsibility. Sanctions against a State were another matter, because they were political in nature and were taken by political bodies, for example the embargoes imposed by the Security Council or the political sanctions imposed by a victor State on a vanquished State. In short, State responsibility as understood under draft article 5 was international, but not criminal.

200. The Special Rapporteur said that in essence the obligation to try or extradite, set out in draft article 6, was based on the principle of universal jurisdiction, one which the Commission could not leave aside, especially as, not having originally received any mandate to prepare a draft statute for an international criminal court, that mandate had been given it much later. When an exceptionally serious crime was committed and violated the fundamental interests of mankind, all States were concerned. The purpose of paragraph 2 of article 6 was to provide for cases in which several States wanted to try

the perpetrator of such a crime. Paragraph 3 provided none the less for the subsequent establishment of an international criminal court, which would retain jurisdiction in the event of the competing jurisdiction of a State. No order of priority had been established in regard to extradition, but the Drafting Committee had given special consideration to the State in whose territory the crime had been committed, leaving open the possibility that an international criminal court might one day be established.

201. As to draft article 7, there had been a difference of opinion on the non-applicability of statutory limitations. Some members thought that absolute non-applicability was too strict and might prevent national reconciliation and amnesty. Others argued that, given the seriousness of the crimes under consideration, statutory limitations should not apply. In the Special Rapporteur's opinion, the Commission should not take a position until the drafting of the Code was completed. He had already explained in earlier reports why he was in favour of keeping the number of crimes dealt with in the Code to a strict minimum. Once the actual crimes were determined, the Commission could then decide whether or not statutory limitations applied. For example, the Code currently included threat of aggression and crimes related to the environment. Serious as they might be, it was difficult to see why there should be no statutory limitation for such crimes.

202. The Special Rapporteur said that, in regard to draft article 8, the general consensus in the Commission had been that the accused should enjoy judicial guarantees. It had been suggested that, in addition to the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, the draft should also take into account regional conventions. Personally, the Special Rapporteur disagreed. In the drafting of an international instrument, documents that were universal in scope, not regional texts, should be taken as the basis.

203. The Special Rapporteur said that draft article 9 involved the transposition of the non bis in idem rule, which was essentially a rule of internal law, to international law. At the internal level there was no problem, as the national courts had to abide by the rule laid down by their internal legislation. In the case of international law, however, difficulties arose because of the lack of any supranational authority which could impose

its decisions on States. The rule had therefore been introduced into international law gradually, first at the regional level by means of treaties or agreements between several States which provided that a decision handed down in one State would have legal effect in another State, and then at the universal level, through the International Covenant on Civil and Political Rights. The draft Code could not now ignore the important issues raised by the rule. In the Drafting Committee, two opposing schools of thought had emerged. Some members, who considered that the rule was so important that it amounted to a subjective right of the individual, were strongly in favour of it being included in the Code. Others were opposed to it, for practical reasons: an individual could, such members argued, circumvent the rule by taking refuge in a neighbouring State with which he had political affinities and whose courts were more likely to be indulgent. The non bis in idem rule would ensure that he was not tried in another State where the courts might be more severe. The Special Rapporteur stated that, in the light of the two differing views, it had been necessary to find a compromise, and that compromise was reflected in draft article 9, which first set forth the basic rule and then provided for the two exceptions in paragraphs 4 (a) and 4 (b). There was, however, a third exception which could arise because of a possible mistake in characterization, as, for example, where a person was tried for murder but it subsequently transpired that his real motive had been genocide. With regard to the word "impartial" in paragraph 2 (b) of the revised draft article 9, which also appeared in the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia, the Special Rapporteur agreed that, in the context, that word was not correct inasmuch as one State could not judge the impartiality of another, at least in theory.

204. The Special Rapporteur said that draft article 10 (Non-retroactivity) had generally been found acceptable.

205. With regard to draft article 11, the Special Rapporteur said that it differed only slightly from the provision in the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, on which it was based. There was just one problem with the draft article: while a person could not generally invoke the order of a

Government or a superior in order to escape criminal responsibility, everything depended on the nature of the order. Some orders were so manifestly illegal that any person who obeyed them would be criminally responsible. That was not always the case, however. It would be very difficult for a private in the army, for instance, to know whether an order he had received was in conformity with the norms of international humanitarian law. The matter could none the less be taken care of in the commentary.

206. The Special Rapporteur recognized that his proposed new draft article 14, (Self-defence, coercion and state of necessity) was extremely brief. It would perhaps have been better to deal, on the one hand, with self-defence, which was indeed a defence, and on the other, with coercion and state of necessity, which were not defences but elements that mitigated the responsibility of the person who committed the crime, without, however, removing the criminal nature of the act itself. It was widely acknowledged, and it was also clear from Part One of the draft on State responsibility, that self-defence precluded wrongfulness. The Special Rapporteur had simply intended to say that, if a State charged with committing an act of aggression invoked self-defence, and that plea was accepted, the wrongfulness of the act would be precluded. Consequently, the leaders of the State who had ordered the act could not be tried for aggression. He had not sought to suggest that it was possible to respond to aggression by genocide.

207. The Special Rapporteur said that coercion, on the other hand, did not preclude wrongfulness, but it could be taken into consideration in setting aside criminal responsibility. A state of necessity was to be distinguished from coercion in that it involved an element of choice. The wealth of judicial practice cited in the Special Rapporteur's fourth report also showed that coercion and state of necessity could be taken into consideration in setting aside or mitigating responsibility, and it therefore supported the inclusion of a reference to such circumstances in the draft Code.

208. In regard to extenuating circumstances, which formed the subject of a new draft article 15, the Special Rapporteur said that, while there was no obligation to include a provision on that subject in the draft Code, it was generally recognized that the courts were entitled to examine any circumstances - personal, family or other - that diminished the responsibility of the accused. As stated in his twelfth report, he did not believe it

appropriate to discuss aggravating circumstances, since the crimes covered in the Code were the most serious of the most serious crimes, and it was difficult to envisage circumstances that would aggravate responsibility still further. If the Commission none the less considered that such a provision should be incorporated in the Code, the Drafting Committee would no doubt be willing to attend to the matter.

209. With regard to the settlement of disputes, the Special Rapporteur expressed readiness to submit an article on the subject.

CHAPTER III

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

A. Introduction 63/

210. The Commission included the topic "The law of the non-navigational uses of international watercourses" in its programme of work at its twenty-third session (1971), in response to the recommendation of the General Assembly in resolution 2669 (XXV) of 8 December 1970.

211. The work begun by Rapporteurs Messrs. Richard D. Kearney, Stephen M. Schwebel, Jens Evensen and Stephen C. McCaffrey, was continued by Mr. Robert Rosenstock who was appointed Special Rapporteur for the topic at the Commission's forty-fourth session in 1992. 64/

212. At its forty-third session the Commission adopted on first reading an entire set of draft articles on the topic, 65/ which was transmitted, in accordance with articles 16 and 21 of the Commission's Statute, through the Secretary-General to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1993.

213. At its forty-fifth session, the Commission considered the first report (A/CN.4/451) of the Special Rapporteur. The Commission also had before it the comments and observations on the draft articles received from Governments (A/CN.4/447 and Add.1-5).

214. At the conclusion of the debate, the Commission, at its 2316th meeting, referred articles 1 to 10 to the Drafting Committee.

63/ For a fuller statement of the earlier background as well as a more detailed account of the Commission's work on the topic, see *Yearbook ... 1985*, vol. II (Part Two), pp. 68-71, paras. 268-278, *Yearbook ... 1989*, vol. II (Part Two), pp. 122-124, paras. 621-636; and report of the International Law Commission on the work of its forty-third session (*Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10*) (A/46/10), pp. 152-153, paras. 29-35.

64/ See the report of the International Law Commission on the work of its forty-fourth session (*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10*) (A/47/10), p. 130, para. 350.

65/ For the articles adopted on first reading, see the report of the International Law Commission on the work of its forty-third session (*Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10*) (A/46/10), pp. 161-172.

215. At its 2322nd meeting, the Commission considered the report of the Drafting Committee (A/CN.4/L.489). It contained the text of articles adopted by the Committee on second reading, namely articles 1 to 6 and articles 8 to 10. The Commission decided to defer action on the proposed draft articles to the following session (1994).

216. At its present session, the Commission considered the second report of the Special Rapporteur (A/CN.4/462 and Corr.1 (Spanish only)) from its 2334th to 2339th meetings. The second report, following upon the first report, contained express proposals for: the deletion of the phrase "flowing into a common terminus" in article 2 of the draft articles; the inclusion in the draft articles of "unrelated" confined groundwaters or aquifers; the inclusion of a new paragraph (b) in article 16 to limit the harm to a notifying State flowing exclusively from the failure of the notified State to respond to notification under articles 12 and 13 of the draft articles; the addition of the word "energy" in article 21, paragraph 3; and the inclusion of a new article 33 dealing with dispute settlement.

217. At its 2339th meeting, the Commission decided to refer the draft articles covered in the Special Rapporteur's second report to the Drafting Committee. It invited the Drafting Committee to proceed with the consideration of the draft articles, without the amendments introduced by the Special Rapporteur on unrelated confined groundwaters, and to submit suggestions to the Commission on how the Commission should proceed on the question of unrelated confined groundwaters.

218. The report of the Drafting Committee (A/CN.4/L.492 and Add.1) was presented to the Commission by its Chairman at its 2353rd meeting. The Commission considered the report at its 2353rd to 2356th meetings. On the basis of that report, the Commission adopted the final text of a set of 33 draft articles on the law of the non-navigational uses of international watercourses and a resolution on confined transboundary groundwater. In accordance with its Statute, the Commission submits the draft articles and the resolution to the General Assembly, together with a recommendation set out below.

B. Recommendation of the Commission

219. The Commission decided to recommend the draft articles on the law of the non-navigational uses of international watercourses and the resolution on confined groundwater to the General Assembly. It recommends the

elaboration of a convention by the Assembly or by an international conference of plenipotentiaries on the basis of the draft articles.

C. Tribute to the Special Rapporteur, Mr. Robert Rosenstock

220. At its 2356th meeting, the Commission, after adopting the draft articles on the law of the non-navigational uses of international watercourses and the resolution on confined groundwater, adopted the following resolution by acclamation:

> "The International Law Commission,
>
> "Having adopted the draft articles on the law of the non-navigational uses of international watercourses and the resolution on confined transboundary groundwater,
>
> "Wishes to express to the Special Rapporteur, Mr. Robert Rosenstock, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft by his tireless efforts and devoted work and for the results achieved in the elaboration of draft articles on the law of the non-navigational uses of international watercourses and the resolution on confined transboundary groundwater."

221. The Commission also expressed its deep appreciation to the previous Special Rapporteurs, Messrs. Richard D. Kearney, Stephen M. Schwebel, Jens Evensen and Stephen C. McCaffrey, for their outstanding contribution to the work on the topic.

D. Draft articles on the law of the non-navigational uses of international watercourses and resolution on confined transboundary groundwater

222. The text of, and commentaries to, draft articles 1 to 33 and the resolution as finally adopted by the Commission at its forty-sixth session are reproduced below.

DRAFT ARTICLES ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

PART I. INTRODUCTION

Article 1

Scope of the present articles

1. The present articles apply to uses of international watercourses and of their waters for purposes other than navigation and to measures of conservation and management related to the uses of those watercourses and their waters.

2. The use of international watercourses for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

Commentary

(1) Paragraph 1. The term "uses" as employed in article 1 derives from the title of the topic. It is intended to be interpreted in its broad sense, to cover all but navigational uses of an international watercourse, as indicated by the phrase "for purposes other than navigation".

(2) Questions have been raised from time to time as to whether the expression "international watercourse" refers only to the channel itself or includes also the waters contained in that channel. In order to remove any doubt, the phrase "and of their waters" is added to the expression "international watercourses" in paragraph 1. The phrase "international watercourses and of their waters" is used in paragraph 1 to indicate that the articles apply both to uses of the watercourse itself and to uses of its waters, to the extent that there may be any difference between the two. References in subsequent articles to an international watercourse should be read as including the waters thereof. Finally, the present articles would apply to uses not only of waters actually contained in the watercourse, but also of those diverted therefrom.

(3) The reference to "measures of conservation and management, related to the uses of" international watercourses is meant to embrace not only measures taken to deal with degradation of water quality, notably uses resulting in pollution, but also those aimed at solving other watercourse problems, such as those relating to living resources, flood control, erosion, sedimentation and salt water intrusion. It will be recalled that the questionnaire addressed to States on this topic 66/ inquired whether problems such as these should be considered and that the replies were, on the whole, that they should be, the specific problems just noted being named. Also included in the expression "measures of conservation and management" are the various forms of cooperation, whether or not institutionalized, concerning the utilization, development, conservation and management of international watercourses, and promotion of the optimal utilization thereof.

66/ The final text of the questionnaire, as communicated to Member States, is reproduced in Yearbook ... 1976, vol. II (Part One), p. 150, document A/CN.4/294 and Add.1, para. 6; see also Yearbook ... 1984, vol. II (Part Two), pp. 82-83, para. 262.

(4) Paragraph 2 of article 1 recognizes that the exclusion of navigational uses from the scope of the present articles cannot be complete. As both the replies of States to the Commission's questionnaire and the facts of the uses of water indicate, the impact of navigation on other uses of water and that of other uses on navigation must be addressed in the present articles. Navigation requirements affect the quantity and quality of water available for other uses. Navigation may and often does pollute watercourses and requires that certain levels of water be maintained; it further requires passages through and around barriers in the watercourse. The interrelationships between navigational and non-navigational uses of watercourses are so numerous that, on any watercourse where navigation takes place or is to be instituted, navigational requirements and effects and the requirements and effects of other water projects cannot be separated by the engineers and administrators charged with development of the watercourse. Paragraph 2 of article 1 has been drafted accordingly. It has been negatively cast, however, to emphasize that navigational uses are not within the scope of the present articles except in so far as other uses of waters affect navigation or are affected by navigation.

(5) According to one member, in the absence of a homogeneous criterion for identification, the uses of an international watercourse for non-navigational purposes could be identifiable in terms of three criteria: their nature (industrial, economic or private), the technical character of the works or the means utilized and the linkage of initiating such undertakings to the jurisdiction or control of a watercourse State.

Article 2

Use of terms

For the purposes of the present articles:

(a) "international watercourse" means a watercourse, parts of which are situated in different States;

(b) "watercourse" means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus;

(c) "watercourse State" means a State in whose territory part of an international watercourse is situated.

Commentary

(1) Article 2 defines certain terms that are used throughout the draft articles. Other terms that are used only in one article are defined in the article in which they are employed.

(2) Subparagraph (a) defines the term "international watercourse", which is used in the title of the topic and throughout the draft articles. The focus in this paragraph is on the adjective "international", since the term "watercourse" is defined in subparagraph (b). Subparagraph (a) provides that, in order to be regarded as an "international" watercourse, parts of the watercourse in question must be situated in different States. As stated in the commentary to subparagraph (c) of the present article, whether parts of a watercourse are situated in different States "depends on physical factors whose existence can be established by simple observation in the vast majority of cases". The most common examples would be a river or stream that forms or crosses a boundary, or a lake through which a boundary passes. The word "situated" is not intended to imply that the water in question is static. As will appear from the definition of "watercourse" in subparagraph (b), while the channel, lake bed or aquifer containing the water is itself stationary, the water it contains is in constant motion.

(3) Subparagraph (b) defines the term "watercourse". While this word is not used in the draft articles except in conjunction with another term (e.g., "international watercourse", "watercourse State", "watercourse agreements"), it is defined separately for purposes of clarity and precision. Since the expression "international watercourse" is defined in subparagraph (a) as a "watercourse" having certain geographical characteristics, a clear understanding of the meaning of the term "watercourse" is necessary.

(4) The term "watercourse" is defined as a "system of surface waters and groundwaters". The term "underground waters" used on first reading was replaced by the term "groundwaters" to establish uniformity throughout the commentary and to better reflect contemporary usage. The phrase "groundwaters" refers to the hydrologic system composed of a number of different components through which water flows, both on and under the surface of the land. These components include rivers, lakes, aquifers, glaciers, reservoirs and canals. So long as these components are interrelated with one another, they form part of the watercourse. This idea is expressed in the phrase, "constituting by virtue of their physical relationship a unitary

whole". Thus, water may move from a stream into the ground under the stream bed, spreading beyond the banks of the stream, then re-emerge in the stream, flow into a lake which empties into a river, be diverted into a canal and carried to a reservoir, etc. Because the surface and groundwaters form a system, and constitute by virtue of their physical relationship a unitary whole, human intervention at one point in the system may have effects elsewhere within it. It also follows from the unity of the system that the term "watercourse" does not include "confined" groundwater, i.e., that which is unrelated to any surface water. Some members of the Commission, however, believed that such groundwater should be included within the term "watercourse", provided that the aquifer in which it is contained is intersected by a boundary. It was also suggested that confined groundwater could be the subject of separate study by the Commission with a view to the preparation of draft articles.

(5) Certain members of the Commission expressed doubts about the inclusion of canals among the components of a watercourse because, in their view, the draft had been elaborated on the assumption that a "watercourse" was a natural phenomenon.

(6) Subparagraph (b) also requires that in order to constitute a "watercourse" for the purposes of the present articles, the system of surface and groundwaters waters must normally flow into a "common terminus". The phrase "flowing into a common terminus" is modified by the word "normally". This represents a compromise aimed not at enlarging the geographic scope of the draft articles but at bridging the gap between, on the one hand, those who urged simple deletion of the phrase "common terminus" on the grounds, inter alia, that it is hydrologically wrong and misleading and would exclude certain important waters and, on the other hand, those who urged retention of the notion of common terminus in order to suggest some limit to the geographic scope of the articles. Thus, for example, the fact that two different drainage basins were connected by a canal would not make them part of a single "watercourse" for the purpose of the present articles. Nor does it mean for example that the Danube and the Rhine form a single system merely because, at certain times of the year, water flows from the Danube as groundwater into the Rhine via Lake Constance. As a matter of common sense and practical judgement, the Danube and the Rhine remain separate unitary wholes. The phrase as modified by the word "normally" is intended to reflect modern hydrological knowledge as to the complexity of the movement of water as well

as such specific cases as the Rio Grande, the Irawaddy, the Mekong and the Nile. While all the named rivers are "a system of surface and groundwaters constituting by virtue of their physical relationship a unitary whole", they flow to the sea in whole or in part via groundwater, a series of distributaries which may be as much as 300 km removed from each other (deltas) or empty at certain times of the year into lakes and at other times into the sea.

(7) As already indicated, the definition of "watercourse State" which was formerly contained in article 3 has been moved, without change, to subparagraph (c) of article 2. This change was made in order to present together, in a single article on use of terms, definitions of expressions that appear throughout the present articles.

(8) The concept of a watercourse or river system is not a novel one. The expression has long been used in international agreements to refer to a river, its tributaries and related canals. The Treaty of Versailles contains a number of references to "river systems". For example, in declaring various rivers to be "international", the Treaty refers to "all navigable parts of these river systems ... together with lateral canals and channels constructed either to duplicate, or to improve naturally navigable sections of the specified river systems, or to connect two naturally navigable sections of the same river". 67/ While the article in question is concerned with navigational uses, there is no doubt that equitable utilization could be affected, or significant harm caused, through the same system of waters by virtue of their very interconnectedness. In the River Oder case, the Permanent Court of International Justice held that the international regime of the river Oder extended, under the Treaty of Versailles, to: "All navigable parts of these river systems ... together with lateral canals or channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems ...". 68/

67/ Treaty of Versailles, article 331, British and Foreign State Papers, 1919, vol. CXII (London, H.M. Stationery Office, 1922), p. 173. See also, e.g. article 362, which refers to "the Rhine river system", ibid., p. 184.

68/ Judgement of 10 September 1929, P.C.I.J., Series A, No. 23.

(9) Provisions similar to those of the Treaty of Versailles may be found in the 1921 Convention instituting the definitive status of the Danube. That agreement refers in its article 1 to the "internationalized river system", which article 2 defines to include "[a]ny lateral canals or waterways which may be constructed ...". 69/

(10) More recently, the 1950 Convention between the Union of Soviet Socialist Republics and Hungary refers in its articles 1 and 2 to "the water systems of the Tisza river basin". 70/ A series of treaties between Yugoslavia and its neighbours, 71/ concluded in the mid-1950s, include within their scope, *inter alia*, "watercourses and water systems" and, in particular, "groundwater". 72/ Two of those treaties contain a broad definition of the expression "water system", which includes "all watercourses (surface or underground, natural or artificial)". 73/

69/ League of Nations, *Treaty Series*, vol. XXVI, p. 177.

70/ Convention between the USSR and Hungary concerning measures to prevent floods and to regulate the water regime on the Soviet-Hungarian frontier in the area of the frontier river Tisza, 9 June 1950, United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the utilization of International Rivers for Other Purposes than Navigation* (hereinafter referred to as *Legislative Texts*) (United Nations publication, Sales No. 63.V.4), Treaty No. 227, p. 827.

71/ *Legislative Texts*, Treaty Nos. 228 (with Hungary), 128 (with Albania) and 161 (with Bulgaria). See also the 1964 Treaty between Poland and the Soviet Union, United Nations, *Treaty Series*, vol. 552, p. 175, article 2, para. 3; the 1972 Convention between Switzerland and Italy concerning the protection of frontier waters against pollution, *Revue générale de droit international public*, p. 265 (1975); and the Frontier Rivers Agreement of 16 September 1971 between Finland and Sweden, Chapter 3, article 1, United Nations, *Treaty Series*, vol. 825, p. 191.

72/ *Legislative Texts*, Treaties nos. 228, 128 and 161.

73/ Ibid., Treaties nos. 128 and 228, article 1, para. 3.

(11) The Indus Waters Treaty of 1960 between India and Pakistan also utilizes the system concept. In the preamble of that agreement, the parties declare that they are "desirous of attaining the most complete and satisfactory utilization of the waters of the Indus system of rivers ...". 74/ The Treaty applies to named rivers, their tributaries and any connecting lakes, 75/ and defines the term "tributary" broadly. 76/

(12) Among more modern treaties, the Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System, and the annexed Action Plan, 77/ are noteworthy for their holistic approach to international water resources management. For example, the Action Plan states its objective as being to overcome certain enumerated problems "and thus to promote the development, and implementation of environmentally sound water resources management in the whole river system". 78/ A number of other treaties further demonstrate that States recognize in their practice the

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74/ Indus Waters Treaty of 19 September 1960 between India and Pakistan, ibid., Treaty No. 98, p. 300.

75/ Ibid., article 1, para. (3).

76/ Ibid., article 1, para. (2).

77/ United Nations Environment Programme, Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System, Final Act, Harare, 26-28 May 1987 (United Nations, 1987), reprinted in International Legal Materials, vol. XXVII (1988), p. 1109.

78/ Action Plan, ibid., para. 15.

importance of dealing with international watercourse systems in their entirety. 79/ International organizations and experts have reached similar conclusions. 80/

79/ These agreements include the 1963 Act regarding Navigation and Economic Cooperation between the States of the Niger Basin, Act of 26 October 1963 in Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation, Natural Resources/Water Series No. 13 (1984) (United Nations publication, Sales No. 84.II.A.7), p. 6. See also the Convention of 21 November 1980 creating the Niger Basin Authority, ibid., p. 56; the 1964 Convention and Statutes relating to the development of the Chad Basin, ibid., p. 32; the 1978 Convention relating to the creation of the Gambia River Basin Development Organization, ibid., p. 42; the 1969 Treaty on the River Plate Basin, United Nations, Treaty Series, vol. 875, p. 3, summarized in Yearbook ... 1974, vol. II (Part Two), p. 291, document A/CN.4/274, para. 60; the 1961 Treaty relating to development of the water resources of the Columbia River basin; the Treaty of 17 January 1961 between Canada and the United States, Legislative Texts, Treaty No. 65; and the 1944 Exchange of notes relating to a study of the use of the waters of the Columbia River Basin, United Nations, Treaty Series, vol. 109, p. 191. It is interesting to note that at least one of the States through whose territory the Columbia River flows has used the term "system" in referring to international watercourses: see "Legal aspects of the use of systems of international waters with reference to the Columbia-Kootenay river system under customary international law and the Treaty of 1909", Memorandum of the [United States] State Department, 85th Congress, Second Session, document No. 118 (Washington, D.C., 1958), p. 89.

80/ The work of the Economic Commission for Europe follows this general approach. See, e.g., the Declaration of Policy on the Rational Use of Water, adopted by the ECE in 1984, ECE, Two Decades of Cooperation on Water, document ECE/ENVWA/2 (1988), p. 15; and other instruments contained in that publication. A number of meetings held under United Nations auspices have adopted recommendations urging that international watercourses be dealt with as a unitary whole. See, e.g., the recommendation adopted at the Interregional Meeting on River and Lake Basin Development, held at Addis Ababa in 1988, set forth in Natural Resources/Water Series No. 20 (1990) (United Nations publication, Sales No. 90.II.A.10), p. 18. The New York Resolution, adopted in 1958 by the International Law Association, contains the "principle of international law" that "A system of rivers and lakes in a drainage basin should be treated as an integrated whole (and not piecemeal)". ILA, Report of the Forty-Eighth Conference, New York, 1958, annex II, p. 99, Agreed Principles of International Law, Principle I. The Helsinki Rules on the Uses of the Waters of International Rivers (hereinafter referred to as "Helsinki Rules"), adopted by the ILA in 1966, employ in commentary (a) to article II the expression "system of waters" in defining the term "international drainage basin", International Law Association, Report of the Fifty-Second Conference, Helsinki, 1966. See also article I of the 1961 Salzburg Resolution on the Use of International Non-Maritime Waters, adopted by the Institute of International Law (Watershed extending upon the territory of two or more States), Annuaire de l'Institut de droit international, vol. 49-II (1961), p. 87, and the Athens Resolution on the Pollution of Rivers

(13) Subparagraph (c) defines the expression "watercourse States", which will be used throughout the present articles.

(14) The definition set out in subparagraph (c) is one which relies on a geographical criterion, namely whether "part of an international watercourse", as that expression is defined in this article, is situated in the State in question. Whether this criterion is satisfied depends on physical factors whose existence can be established by simple observation in the vast majority of cases.

Article 3

Watercourse agreements

> 1. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof.
>
> 2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse.
>
> 3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

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and Lakes and International Law, adopted by the Institute in 1979, ibid., vol. 58 (I), Athens session, September 1979, (Basel/Munich 1980). A private group of legal experts, the Inter-American Bar Association, adopted a resolution in 1957 dealing with "every watercourse or system or rivers or lakes ... which may traverse or divide the territory of two or more States ... referred to hereinafter as a 'system of international waters'". Inter-American Bar Association, Proceedings of the 10th Conference held at Buenos Aires from 14-21 November 1957 (2 vols.) (Buenos Aires, 1958), reproduced in Yearbook ... 1974, vol. II (Part Two), p. 208, document A/5409, para. 1092. The need to regulate and develop an international watercourse as a whole has also been recognized by such individual experts as H.A. Smith, in The Economic Uses of International Rivers (1931), pp. 150-151; James Brierly, in The Law of Nations (5th ed. 1955), p. 204; and J. Lammers, in Pollution of International Watercourses (1984), pp. 19-20.

Commentary

(1) The diversity characterizing individual watercourses and the consequent difficulty in drafting general principles that will apply universally to various watercourses throughout the world have been recognized by the Commission from the early stages of its consideration of the topic. Some States and scholars have viewed this pervasive diversity as an effective barrier to the progressive development and codification of the law on the topic on a universal plane. But it is clear that the General Assembly, aware of the diversity of watercourses, has nevertheless assumed that the subject is one suitable for the Commission's mandate.

(2) During the course of its work on the present topic, the Commission has developed a promising solution to the problem of the diversity of international watercourses and the human needs they serve: that of a framework agreement, which will provide for the States parties the general principles and rules governing the non-navigational uses of international watercourses, in the absence of specific agreement among the States concerned, and provide guidelines for the negotiation of future agreements. This approach recognizes that optimal utilization, protection and development of a specific international watercourse are best achieved through an agreement tailored to the characteristics of that watercourse and to the needs of the States concerned. It also takes into account the difficulty, as revealed by the historical record, of reaching such agreements relating to individual watercourses without the benefit of general legal principles concerning the uses of such watercourses. It contemplates that these principles will be set forth in the framework agreement. This approach has been broadly endorsed both in the Commission and in the Sixth Committee of the General Assembly. 81/

(3) There are precedents for such framework agreements in the field of international watercourses. Early illustrations are the Convention relating

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81/ See, in this regard, the conclusions contained in the commentary (paras. (2) and (4)) to article 3 as provisionally adopted by the Commission at its thirty-second session (Yearbook ... 1980, vol. II (Part Two), pp. 112-113), in the report of the Commission on its thirty-sixth session (Yearbook ... 1984, vol. II (Part Two), p. 88, para. 285) and its report on its thirty-eighth session (Yearbook ... 1986, vol. II (Part Two), p. 63, para. 242).

to the Development of Hydraulic Power Affecting more than One State (Geneva, 9 December 1923), 82/ and the Treaty of the River Plate Basin (Brasilia, 23 April 1969). 83/

(4) Paragraph 1 of article 3 makes specific provision for the framework-agreement approach, under which the present articles may be tailored to fit the requirements of specific international watercourses. This paragraph thus defines "watercourse agreements" as those which "apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof". The phrase "apply and adjust" is intended to indicate that, while the Commission contemplates that agreements relating to specific international watercourses will take due account of the provisions of the present articles, the latter are essentially residual in character. The States whose territories include a particular international watercourse will thus remain free not only to apply the provisions of the present articles, but also to adjust them to the special characteristics and uses of that watercourse or of part thereof.

(5) Paragraph 2 of article 3 further clarifies the nature and subject-matter of "watercourse agreements", as that expression is used in the present articles, as well as the conditions under which such agreements may be entered into. The first sentence of the paragraph, in providing that such an agreement "shall define the waters to which it applies", emphasizes the unquestioned freedom of watercourse States to define the scope of the agreements they conclude. It recognizes that watercourse States may confine their agreement to the main stem of a river forming or traversing an international boundary, include within it the waters of an entire drainage basin, or take some intermediate approach. The requirement to define the waters also serves the purpose of affording other potentially concerned States notice of the precise subject-matter of the agreement. The opening phrase of the paragraph emphasizes that there is no obligation to enter into such specific agreements.

82/ League of Nations, Treaty Series, vol. XXXVI, p. 75; see article 4 thereof.

83/ United Nations, Treaty Series, vol. 875, p. 3; see also Yearbook ... 1974, vol. II (Part Two), p. 291, document A/CN.4/274, para. 60. The States parties are Argentina, Bolivia, Brazil, Paraguay and Uruguay.

(6) The second sentence of paragraph 2 deals with the subject-matter of watercourse or system agreements. The language is permissive, affording watercourse States a wide degree of latitude, but a proviso is included to protect the rights of watercourse States that are not parties to the agreement in question. The sentence begins by providing that such an agreement "may be entered into with respect to an entire international watercourse". Indeed, technical experts consider that the most efficient and beneficial way of dealing with a watercourse is to deal with it as a whole, including all watercourse States as parties to the agreement. Examples of treaties following this approach are those relating to the Amazon, the Plate, the Niger and Chad basins. 84/ Moreover, some issues arising out of the pollution of international watercourses necessitate cooperative action throughout an entire watercourse. An example of instruments responding to the need for unified treatment of such problems is the Convention for the Protection of the Rhine against Chemical Pollution (Bonn, 1976). 85/

(7) However, system States must be free to conclude system agreements "with respect to any part" of an international watercourse or a particular project, programme or use, provided that the use by one or more other system States of the waters of the international watercourse system is not, to a significant extent, affected adversely.

(8) Of the 200 largest international river basins, 52 are multi-State basins, among which are many of the world's most important river basins: the Amazon, the Chad, the Congo, the Danube, the Elbe, the Ganges, the Mekong, the Niger, the Nile, the Rhine, the Volta and the Zambezi basins. 86/ In dealing with multi-State systems, States have often resorted to agreements regulating only a portion of the watercourse, which are effective between only some of the States situated on it.

84/ See the discussion of these agreements in the first report of the second Special Rapporteur, Yearbook ... 1979, vol. II (Part One), pp. 167-168, document A/CN.4/320, paras. 93-98.

85/ Ibid., pp. 168-169, para. 100.

86/ Ibid., p. 170, para. 108 (table).

(9) The Systematic Index of International Water Resources Treaties, Declarations, Acts and Cases by Basin, published by FAO 87/, indicates that a very large number of watercourse treaties in force are limited to a part of the watercourse system.

(10) There is often a need for subsystem agreements and for agreements covering limited areas. The differences between the subsystems of some international watercourses, such as the Indus, the Plate and the Niger, are as marked as those between separate drainage basins. Agreements concerning subsystems are likely to be more readily attainable than agreements covering an entire international watercourse, particularly if a considerable number of States are involved. Moreover, there will always be problems whose solution is of interest to only some of the States whose territories are bordered or traversed by a particular international watercourse.

(11) There does not appear to be any sound reason for excluding either subsystem or localized agreements from the application of the framework agreement. A major purpose of the present articles is to facilitate the negotiation of agreements concerning international watercourses, and this purpose encompasses all agreements, whether basin-wide or localized, whether general in nature or dealing with a specific problem. The framework agreement, it is to be hoped, will provide watercourse States with firm common ground as a basis for negotiations - which is what watercourse negotiations lack most at the present time. No advantage is seen in confining the application of the present articles to single agreements embracing an entire international watercourse.

(12) At the same time, if a watercourse agreement is concerned with only part of the watercourse or only a particular project, programme or use relating thereto, it must be subject to the proviso that the use, by one or more other watercourse States not parties to the agreement, of the waters of the watercourse is not, to a significant extent, adversely affected by the agreement. Otherwise, a few States of a multi-State international watercourse could appropriate a disproportionate amount of its benefits for themselves or unduly prejudice the use of its waters by watercourse States not parties to the agreement in question. Such results would run counter to fundamental principles which will be shown to govern the non-navigational uses of international watercourses, such as the right of all watercourse States to use

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87/ FAO, Legislative Study No. 15 (Rome, 1978).

an international watercourse in an equitable and reasonable manner and the obligation not to use a watercourse in such a way as to injure other watercourse States. 88/

(13) In order to fall within the proviso, however, the adverse effect of a watercourse agreement on watercourse States not parties to the agreement must be "significant". If those States are not adversely affected "to a significant extent", other watercourse States may freely enter into such a limited watercourse agreement. Because of the dual meaning of the term "appreciable" as both "measurable" and "significant", it was decided to use the latter term throughout the text. This is not intended to raise the applicable standard.

(14) The expression "to a significant extent" is intended to require that the effect is one that can be established by objective evidence (provided the evidence can be secured). There must moreover be a real impairment of use. Situations for example such as were involved in the Lake Lanoux case (see paras. (19) and (20) below), in which Spain insisted upon delivery of Lake Lanoux water through the original system, are among those sought to be excluded. The arbitral tribunal found that in that case:

> "... thanks to the restitution effected by the devices described above, none of the guaranteed users will suffer in his enjoyment of the waters ...; at the lowest water level, the volume of the surplus waters of the Carol, at the boundary, will at no time suffer a diminution; ...". 89/

The Tribunal continued by pointing out that Spain might have claimed that the proposed diversionary works:

> ... would bring about an ultimate pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristic which could injure

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88/ The second sentence of paragraph 2 is based on the assumption, well founded in logic as well as in State practice, that less than all watercourse States would conclude an agreement that purported to apply to an entire international watercourse. If such an agreement were concluded, however, its implementation would have to be consistent with paragraph 2 of article 3 for the reasons stated in paragraph (12) of the commentary.

89/ International Law Reports, 1957, vol. 24 (1961), p. 123, para. 6 (first subparagraph) of the arbitral award. Original French text of the award in United Nations, Reports of International Arbitral Awards, vol. XII (Sales No. 63.V.3), pp. 281 et seq.; partial translation in Yearbook ... 1974, vol. II (Part Two), pp. 194 et seq., document A/5409, paras. 1055-1068.

> Spanish interests ... Neither in the dossier nor in the pleadings in this case is there any trace of such an allegation. 90/

In the absence of any assertion that Spanish interests were affected in a tangible way, the tribunal held that Spain could not require maintenance of the natural flow of the waters. It should be noted that the French proposal relied upon by the tribunal was arrived at only after a long-drawn-out series of negotiations beginning in 1917, which led to, inter alia, the establishment of a mixed commission of engineers in 1949 and the presentation in 1950 of a French proposal (later replaced by the plan on which the tribunal pronounced) which would have significantly affected the use and enjoyment of the waters in question by Spain. 91/

(15) At the same time, the term "significant" is not used in the sense of "substantial". What are to be avoided are localized agreements, or agreements concerning a particular project, programme or use, which have a significant adverse effect upon third watercourse States. While such an effect must be capable of being established by objective evidence and not be trivial in nature, it need not rise to the level of being substantial.

(16) Paragraph 3 of article 3 addresses the situation in which one or more watercourse States consider that adjustment or application of the provisions of the present articles to a particular international watercourse is required because of the characteristics and uses of that watercourse. In that event, it requires that other watercourse States enter into consultations with the State or States in question with a view to negotiating, in good faith, an agreement or agreements concerning the watercourse.

(17) Moreover, watercourse States are not under an obligation to conclude an agreement before using the waters of the international watercourse. To require conclusion of an agreement as a pre-condition of use would be to afford watercourse States the power to veto a use by other watercourse States of the waters of the international watercourse by simply refusing to reach agreement. Such a result is not supported by the terms or the intent of

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90/ International Law Reports, 1957 ..., p. 123, para. 6 (third subparagraph) of the arbitral award.

91/ Ibid., pp. 105-108. See the discussion of this arbitration in the previous Special Rapporteur's second report, Yearbook ... 1986, vol. II (Part One), pp. 116 et seq., document A/CN.4/399 and Add.1 and 2, paras. 111-124.

article 3. Nor does it find support in State practice or international judicial decisions (indeed, the Lake Lanoux arbitral award negates it).

(18) Even with these qualifications, the Commission is of the view that the considerations set forth in the preceding paragraphs, especially paragraph (12), import the necessity of the obligation set out in paragraph 3 of article 3. Furthermore, the existence of a principle of law requiring consultations among States in dealing with fresh water resources is explicitly supported by the arbitral award in the Lake Lanoux case.

(19) That case involved a proposal by the French Government to carry out certain works for the utilization of the waters of Lake Lanoux, waters which flowed into the Carol River and on to the territory of Spain. Consultations and negotiations over the proposed diversion of waters from Lake Lanoux took place between the Governments of France and Spain intermittently from 1917 until 1956. Finally, France decided upon a plan of diversion which entailed the full restoration of the diverted waters before the Spanish border. Spain nevertheless feared that the proposed works would adversely affect Spanish rights and interests, contrary to the Treaty of Bayonne of 26 May 1866 between France and Spain and the Additional Act of the same date. Spain claimed that, under the Treaty and the Additional Act, such works could not be undertaken without the previous agreement of France and Spain. Spain asked the arbitral tribunal to declare that France would be in breach of the Treaty of Bayonne and of the Additional Act if it implemented the diversion scheme without Spain's agreement, while France maintained that it could legally proceed without such agreement.

(20) It is important to note that the obligation of States to negotiate the apportionment of the waters of an international watercourse was uncontested, and was acknowledged by France not merely by reason of the provisions of the Treaty of Bayonne and the Additional Act, but as a principle to be derived from authorities. Moreover, while the arbitral tribunal based some of its reasoning relating to the obligation to negotiate on the provisions of the Treaty and the Additional Act, it by no means confined itself to interpreting those provisions. In holding against the Spanish contention that Spain's agreement was a pre-condition of France's proceeding, the tribunal addressed the question of the obligation to negotiate as follows:

> "In effect, in order to appreciate in its essence the necessity for prior agreement, one must envisage the hypothesis in which the interested States cannot reach agreement. In such case, it must be admitted that the State which is normally competent has lost its right to act alone as

> a result of the unconditional and arbitrary opposition of another State. This amounts to admitting a "right of assent", a "right of veto", which at the discretion of one State paralyses the exercise of the territorial jurisdiction of another.
>
> "That is why international practice prefers to resort to less extreme solutions by confining itself to obliging the States to seek, by preliminary negotiations, terms for an agreement, without subordinating the exercise of their competences to the conclusion of such an agreement. Thus one speaks, although often inaccurately, of the "obligation of negotiating an agreement". In reality, the engagements thus undertaken by States take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith ... 92/
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> "...
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> "... In fact, States are today perfectly conscious of the importance of the conflicting interests brought into play by the industrial use of international rivers, and of the necessity to reconcile them by mutual concessions. The only way to arrive at such compromises of interests is to conclude agreements on an increasingly comprehensive basis. International practice reflects the conviction that States ought to strive to conclude such agreements; there would thus appear to be an obligation to accept in good faith all communications and contacts which could, by a broad comparison of interests and by reciprocal good will, provide States with the best conditions for concluding agreements. ..." 93/

(21) For these reasons, paragraph 3 of article 3 requires watercourse States to enter into consultations, at the instance of one or more of them, with a

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92/ International Law Reports, 1957 ..., p. 128, para. 11 (second and third subparagraphs) of the arbitral award.

93/ Ibid., pp. 129-130, para. 13 (first subparagraph) of the arbitral award. The obligation to negotiate has also been addressed by the International Court of Justice in cases concerning fisheries and maritime delimitation. See, for example, the Fisheries Jurisdiction cases, I.C.J. Reports 1974, pp. 3 and 175; the North Sea Continental Shelf cases, I.C.J. Reports 1969, p. 3; the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982, p. 18, at pp. 59-60, paras. 70-71; and the case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), I.C.J. Reports 1984, p. 246, at pp. 339-340, para. 230.

view to negotiating, in good faith, one or more agreements which would apply or adjust the provisions of the present articles to the characteristics and uses of the international watercourse in question.

Article 4

Parties to watercourse agreements

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse may be affected to a significant extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

Commentary

(1) The purpose of article 4 is to identify the watercourse States that are entitled to participate in consultations and negotiations relating to agreements concerning part or all of an international watercourse, and to become parties to such agreements.

(2) Paragraph 1 is self-explanatory. When an agreement deals with an entire international watercourse, there is no reasonable basis for excluding a watercourse State from participation in its negotiation, from becoming a party thereto, or from participating in any relevant consultations. It is true that there may be basin-wide agreements that are of little interest to one or more watercourse States. But, since the provisions of these agreements are intended to be applicable throughout the watercourse, the purpose of the agreements would be stultified if every watercourse State were not given the opportunity to participate.

(3) Paragraph 2 is concerned with agreements that deal with only part of the watercourse. It provides that any watercourse State whose use of the watercourse may be significantly affected by the implementation of an agreement applying to only a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations and negotiations relating to such a proposed agreement, to the extent that its use is thereby affected, and is further entitled to become a party to the agreement. The rationale is that, if the use of water by a State can be

affected significantly by the implementation of treaty provisions dealing with part or aspects of a watercourse, the scope of the agreement necessarily extends to the territory of that State.

(4) Because water in a watercourse is in continuous movement, the consequences of action taken under an agreement with respect to water in a particular territory may produce effects beyond that territory. For example, States A and B, whose common border is the River Styx, agree that each may divert 40 per cent of the river flow for domestic consumption, manufacturing and irrigation purposes at a point 25 miles upstream from State C, through which the Styx flows upon leaving States A and B. The total amount of water available to State C from the river, including return flow in States A and B, will be reduced as a result of the diversion by 25 per cent from what would have been available without diversion.

(5) The question is not whether States A and B are legally entitled to enter into such an agreement. It is whether a set of draft articles that are to provide general principles for the guidance of States in concluding agreements on the use of fresh water should ensure that State C has the opportunity to join in consultations and negotiations, as a prospective party, with regard to proposed action by States A and B that would substantially reduce the amount of water that flowed through State C's territory.

(6) The right is formulated as a qualified one. It must appear that there will be a significant effect upon the use of water by a State in order for it to be entitled to participate in consultations and negotiations relating to the agreement, and to become a party thereto. If a watercourse State would not be affected by an agreement regarding a part or an aspect of the watercourse, the physical unity of the watercourse does not of itself require that the State have these rights. The participation of one or more watercourse States whose interests were not directly concerned in the matters under discussion would mean the introduction of unrelated interests into the process of consultation and negotiation.

(7) The meaning of the term "significant" is explained in paragraphs (14) and (15) of the commentary to article 3. As indicated there, it is not used in the sense of "substantial". A requirement that a States' use must be substantially affected before it would be entitled to participate in consultations and negotiations would impose too heavy a burden upon the third State. The exact extent to which the use of water may be affected by proposed action is likely to be far from clear at the outset of negotiations. The

Lake Lanoux decision illustrates the extent to which plans may be modified as a result of negotiations and the extent to which such modification may favour or harm a third State. That State should be required to establish only that its use may be affected to a significant extent.

(8) The right of a watercourse State to participate in consultations and negotiations concerning a limited watercourse agreement is further qualified. The State is so entitled only "to the extent that its use is thereby affected", i.e. to the extent that implementation of the agreement would affect its use of the watercourse. The watercourse State is not entitled to participate in consultations or negotiations concerning elements of the agreement whose implementation would not affect its use of the waters, for the reasons given in paragraph (6) of the present commentary. The right of the watercourse State to become a party to the agreement is not similarly qualified, because of the technical problem of a State becoming a party to a part of an agreement. This matter would most appropriately be dealt with on a case-by-case basis: in some instances, the State concerned might become a party to the elements of the agreement affecting it via a protocol; in others, it might be appropriate for it to become a full party to the agreement proper. The most suitable solution in each case will depend entirely on the nature of the agreement, the elements of it that affect the State in question and the nature of the effects involved.

(9) Paragraph 2 should not, however, be interpreted as suggesting that an agreement dealing with an entire watercourse or with a part or an aspect thereof should exclude decision-making with regard to some or all aspects of the use of the watercourse through procedures in which all watercourse States participate. For most, if not all, watercourses, the establishment of procedures for coordinating activities throughout the system is highly desirable and perhaps necessary, and those procedures may well include requirements for full participation by all watercourse States in decisions dealing with only a part of the watercourse. However, such procedures must be adopted for each watercourse by the watercourse States, on the basis of the special needs and circumstances of the watercourse. Paragraph 2 is confined to providing that, as a matter of general principle, a watercourse State does have the right to participate in consultations and negotiations concerning a limited agreement which may affect that State's interests in the watercourse, and to become a party to such an agreement.

PART II. GENERAL PRINCIPLES

Article 5

Equitable and reasonable utilization and participation

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.

Commentary

(1) Article 5 sets out the fundamental rights and duties of States with regard to the utilization of international watercourses for purposes other than navigation. One of the most basic of these is the well-established rule of equitable utilization, which is laid down and elaborated upon in paragraph 1. The principle of equitable participation, which complements the rule of equitable utilization, is set out in paragraph 2.

(2) Paragraph 1 states the basic rule of equitable utilization. Although cast in terms of an obligation, the rule also expresses the correlative entitlement, namely that a watercourse State has the right, within its territory, to a reasonable and equitable share, or portion, of the uses and benefits of an international watercourse. Thus a watercourse State has both the right to utilize an international watercourse in an equitable and reasonable manner and the obligation not to exceed its right to equitable utilization or, in somewhat different terms, not to deprive other watercourse States of their right to equitable utilization.

(3) The second sentence of paragraph 1 elaborates upon the concept of equitable utilization, providing that watercourse States shall if they choose to use and develop an international watercourse do so with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse. The expression "with a view to" indicates that the attainment of optimal utilization and benefits is the objective to be sought by watercourse States in utilizing an international watercourse. Attaining optimal utilization and benefits does not mean achieving the

"maximum" use, the most technologically efficient use, or the most monetarily valuable use much less short-term gain at the cost of long-term loss. Nor does it imply that the State capable of making the most efficient use of a watercourse - whether economically, in terms of avoiding waste, or in any other sense - should have a superior claim to the use thereof. Rather, it implies attaining maximum possible benefits for all watercourse States and achieving the greatest possible satisfaction of all their needs, while minimizing the detriment to, or unmet needs of, each. It should also be mentioned that, in line with the principle of sustainability, "Water resources development and management should be planned in an integrated manner, taking into account long-term planning needs and those with narrower horizons". Such management and development "should incorporate in particular, the environmental, economic and social considerations". It should "include the requirements of all users as well as those relating to prevention and mitigation of water-related hazards and constitute an integral part of the social economic development planning process". 94/

(4) This goal must not be pursued blindly, however. The concluding phrase of the second sentence emphasizes that efforts to attain optimal utilization and benefits must be "consistent with adequate protection" of the international watercourse. The expression "adequate protection" is meant to cover not only measures such as those relating to conservation, security and water-related disease, but also measures of "control" in the technical, hydrological sense of the term, such as those taken to regulate flow, to control floods, pollution and erosion, to mitigate drought and to control saline intrusion. In view of the fact that any of these measures or works may limit to some degree the uses that otherwise might be made of the waters by one or more of the watercourse States, the second sentence speaks of attaining optimal utilization and benefits "consistent with" adequate protection. It should be added that, while primarily referring to measures undertaken by individual States, the expression "adequate protection" does not exclude cooperative measures, works or activities undertaken by States jointly.

(5) Paragraph 2 embodies the concept of equitable participation. The core of this concept is cooperation between watercourse States through participation,

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94/ See The United Nations Programme of Action from Rio, The Earth Summit, Agenda 21, Chap. 18 "Protection of the quality and supply of freshwater resources: Application of integrated approaches to the development, management and use of water resources", para. 18, 16, p. 169.

on an equitable and reasonable basis, in measures, works and activities aimed at attaining optimal utilization of an international watercourse, consistent with adequate protection thereof. Thus the principle of equitable participation flows from, and is bound up with, the rule of equitable utilization set out in paragraph 1. It recognizes that, as concluded by technical experts in the field, cooperative action by watercourse States is necessary to produce maximum benefits for each of them, while helping to maintain an equitable allocation of uses and affording adequate protection to the watercourse States and the international watercourse itself. In short, the attainment of optimal utilization and benefits entails cooperation between watercourse States through their participation in the protection and development of the watercourse. Thus watercourse States have a right to the cooperation of other watercourse States with regard to such matters as flood-control measures, pollution-abatement programmes, drought-mitigation planning, erosion control, disease vector control, river regulation (training), the safeguarding of hydraulic works and environmental protection, as appropriate under the circumstances. Of course, for greatest effectiveness, the details of such cooperative efforts should be provided for in one or more watercourse agreements. But the obligation and correlative right provided for in paragraph 2 are not dependent on a specific agreement for their implementation.

(6) The second sentence of paragraph 2 emphasizes the affirmative nature of equitable participation by providing that it includes not only "the right to utilize the watercourse", but also the duty to cooperate actively with other watercourse States "in the protection and development" of the watercourse. This duty to cooperate is linked to article 8 on the general obligation to cooperate in relation to the use, development and protection of international watercourses. 95/ While not stated expressly in paragraph 2, the right to utilize an international watercourse referred to in the second sentence carries with it an implicit right to the cooperation of other watercourse States in maintaining an equitable allocation of the uses and benefits of the watercourse. The latter right is elaborated in greater detail in article 8 on cooperation.

95/ See Yearbook ... 1988, vol. II (Part Two), paras. 95-99; see also the previous Special Rapporteur's third report, Yearbook ... 1987, vol. II (Part One), p. 15, document A/CN.4/406 and Add.1 and 2, para. 59.

(7) In the light of the foregoing explanations of the provisions of article 5, the following paragraphs provide a brief discussion of the concept of equitable utilization and a summary of representative examples of support for the doctrine.

(8) There is no doubt that a watercourse State is entitled to make use of the waters of an international watercourse within its territory. This right is an attribute of sovereignty and is enjoyed by every State whose territory is traversed or bordered by an international watercourse. Indeed, the principle of the sovereign equality of States results in every watercourse State having rights to the use of the watercourse that are qualitatively equal to, and correlative with, those of other watercourse States. 96/ This fundamental principle of "equality of right" does not, however, mean that each watercourse State is entitled to an equal share of the uses and benefits of the watercourse. Nor does it mean that the water itself is divided into identical portions. Rather, each watercourse State is entitled to use and benefit from the watercourse in an equitable manner. The scope of a State's rights of equitable utilization depends on the facts and circumstances of each individual case, and specifically on a weighing of all relevant factors, as provided in article 6.

(9) In many cases, the quality and quantity of water in an international watercourse will be sufficient to satisfy the needs of all watercourse States. But where the quantity or quality of the water is such that all the reasonable and beneficial uses of all watercourse States cannot be fully realized, a "conflict of uses" results. In such a case, international practice recognizes that some adjustments or accommodations are required in order to preserve each

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96/ See, for example, commentary (a) to article IV of the Helsinki Rules (ILA, Report of the Fifty-Second Conference, Helsinki, 1966, pp. 486-487).

watercourse State's equality of right. These adjustments or accommodations are to be arrived at on the basis of equity, 97/ and can best be achieved on the basis of specific watercourse agreements.

(10) A survey of all available evidence of the general practice of States, accepted as law, in respect of the non-navigational uses of international watercourses - including treaty provisions, positions taken by States in specific disputes, decisions of international courts and tribunals, statements of law prepared by intergovernmental and non-governmental bodies, the views of learned commentators and decisions of municipal courts in cognate cases - reveals that there is overwhelming support for the doctrine of equitable utilization as a general rule of law for the determination of the rights and obligations of States in this field. 98/

(11) The basic principles underlying the doctrine of equitable utilization are reflected, explicitly or implicitly, in numerous international agreements between States in all parts of the world. 99/ While the language and

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97/ See, for example, article 3 of the resolution on "Utilization of non-maritime international waters (except for navigation)" adopted by the Institute of International Law at its Salzburg session in September 1961, which reads:

"Article 3

"If the States are in disagreement over the scope of their rights of utilization, settlement will take place on the basis of equity, taking particular account of their respective needs, as well as of other pertinent circumstances."

(Annuaire de l'Institut de droit international, 1961 (Basel), vol. 49, tome II, p. 382; see also Yearbook ...1974, vol. II (Part Two), p. 202, document A/5409, para. 1076).

98/ See, for example, the authorities surveyed in the previous Special Rapporteur's second report, Yearbook ... 1986, vol. II (Part One), pp. 103 et seq., document A/CN.4/399 and Add.1 and 2, paras. 75-168.

99/ See, for example, the agreements surveyed in the third report of the second Special Rapporteur for the topic, Yearbook ... 1982, vol. II (Part One) (and corrigendum), pp. 76-82, document A/CN.4/348, paras. 49-72; the authorities discussed in the previous Special Rapporteur's second report (see footnote 98 above); and the agreements listed in annexes I and II to chap. II of the latter report.

approaches of these agreements vary considerably, 100/ their unifying theme is the recognition of rights of the parties to the use and benefits of the international watercourse or watercourses in question that are equal in principle and correlative in their application. This is true of treaty provisions relating to both contiguous 101/ and successive 102/ watercourses.

(12) A number of modern agreements, rather than stating a general guiding principle or specifying the respective rights of the parties, go beyond the principle of equitable utilization by providing for integrated river-basin

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100/ See the examples referred to in the previous Special Rapporteur's second report (see footnote 98 above).

101/ The expression "contiguous watercourse" is used here to mean a river, lake or other watercourse which flows between or is located upon, and is thus "contiguous" to, the territories of two or more States. Such watercourses are sometimes referred to as "frontier" or "boundary" waters. The previous Special Rapporteur's second report contains an illustrative list of treaty provisions relating to contiguous watercourses, arranged by region, which recognize the equality of the rights of the riparian States in the use of the waters in question (ibid., chap. II, annex I).

102/ The expression "successive watercourse" is used here to mean a watercourse which flows ("successively") from one State to another State or States. According to Lipper, "all of the numerous treaties dealing with successive rivers have one common element - the recognition of the shared rights of the signatory States to utilize the waters of an international river" (J. Lipper, "Equitable utilization", in The Law of International Drainage Basins, A.H. Garretson, R.D. Hayton and C.J. Olmstead, eds. (Dobbs Ferry, N.Y., Oceana Publications, 1967), p. 33). The previous Special Rapporteur's second report contains an illustrative list of treaty provisions relating to successive watercourses which apportion the waters, limit the freedom of action of the upstream State, provide for sharing of the benefits of the waters, or in some other way equitably apportion the benefits, or recognize the correlative rights of the States concerned (see footnote 98 above).

management. 103/ These instruments reflect a determination to achieve optimal utilization and benefits through organizations competent to deal with an entire international watercourse.

(13) A review of the manner in which States have resolved actual controversies pertaining to the non-navigational uses of international watercourses reveals a general acceptance of the entitlement of every watercourse State to utilize and benefit from an international watercourse in a reasonable and equitable manner. 104/ While some States have, on occasion, asserted the doctrine of absolute sovereignty, these same States have generally resolved the

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103/ See especially the recent agreements concerning African river basins, including: the Agreement of 24 August 1977 for the establishment of the Organization for the management and Development of the Kagera River Basin (United Nations, Treaty Series, vol. 1089, p. 165); the Convention relating to the status of the Senegal River and the Convention establishing the Organization for the Development of the Senegal River, both signed at Nouakchott on 11 March 1972 (United Nations, Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation: Africa, Natural Resources/Water Series No. 13 (Sales No. E/F.84.II.A.7), pp. 16 and 21, respectively; discussed in the previous Special Rapporteur's third report, (see footnote 95 above, paras. 21 et seq.); the Act of 26 October 1963 regarding navigation and economic cooperation between the States of the Niger Basin (United Nations, Treaty Series, vol. 587, p. 9) and the Agreement of 25 November 1964 concerning the Niger River Commission and the Navigation and Transport on the River Niger (ibid., p. 19); the 1965 Convention between Gambia and Senegal for the integrated development of the Gambia River Basin (Cahiers de l'Afrique équatoriale (Paris), 6 March 1965), as well as the 1968 and 1973 agreements concerning the same basin; and the Convention and Statutes of 22 May 1964 relating to the development of the Chad Basin (Official Gazette of the Federal Republic of Cameroon (Yaoundé), vol. 4, No. 18 (15 September 1964), p. 1003).

See also the Treaty of the River Plate Basin of 23 April 1969 (see footnote 83 above).

104/ See generally the survey contained in the previous Special Rapporteur's second report (see footnote 98 above, paras. 78-89).

controversies in the context of which such assertions were made by entering into agreements that actually apportioned the water or recognized the rights of other watercourse States. 105/

(14) A number of intergovernmental and non-governmental bodies have adopted declarations, statements of principles, and recommendations concerning the non-navigational uses of international watercourses. These instruments provide additional support for the rules contained in article 5. Only a few representative examples will be referred to here. 106/

(15) An early example of such an instrument is the Declaration of Montevideo concerning the industrial and agricultural use of international rivers, adopted by the Seventh International Conference of American States at its fifth plenary session on 24 December 1933, 107/ which includes the following provisions:

> "...
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> "2. The States have the exclusive right to exploit, for industrial or agricultural purposes, the margin which is under their jurisdiction of the waters of international rivers. This right, however,

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105/ A well-known example is the controversy between the United States of America and Mexico over the waters of the Rio Grande. This dispute produced the "Harmon Doctrine" of absolute sovereignty but was ultimately resolved by the 1906 Convention concerning the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes. See the previous Special Rapporteur's discussion of this dispute and its resolution in his second report (ibid., paras. 79-87), where he concluded that "the 'Harmon Doctrine' is not, and probably never has been, actually followed by the State that formulated it [i.e. the United States]" (ibid., para. 87).

See also the examples of the practice of other States discussed in the same report (ibid., paras. 88-91).

106/ See generally the collection of such instruments in the report by the Secretary-General on "Legal problems relating to the utilization and use of international rivers" and the supplement thereto (Yearbook ... 1974, vol. II (Part Two), p. 33, document A/5409, and p. 265, document A/CN.4/274). See also the representative examples of such instruments discussed by the previous Special Rapporteur in his second report (see footnote 98 above, paras. 134-155).

107/ The International Conferences of American States, First Supplement 1933-1940 (Washington (D.C.), Carnegie Endowment for International Peace, 1940), p. 88. See the reservations by Venezuela and Mexico and the declaration by the United States of America, ibid., pp. 105-106. All these texts are reproduced in Yearbook ... 1974, vol. II (Part Two), p. 212, document A/5409, annex I.A.

is conditioned in its exercise upon the necessity of not injuring the equal right due to the neighbouring State over the margin under its jurisdiction.

> "...
>
> "4. The same principles shall be applied to successive rivers as those established in articles 2 and 3, with regard to contiguous rivers."

(16) Another Latin American instrument, the Act of Asunción on the use of international rivers, adopted by the Ministers of Foreign Affairs of the River Plate Basin States (Argentina, Bolivia, Brazil, Paraguay and Uruguay) at their Fourth Meeting, from 1 to 3 June 1971, 108/ contains the Declaration of Asunción on the Use of International Rivers, paragraphs 1 and 2 of which provide:

> "1. In contiguous international rivers, which are under dual sovereignty, there must be a prior bilateral agreement between the riparian States before any use is made of the waters.
>
> "2. In successive international rivers, where there is no dual sovereignty, each State may use the waters in accordance with its needs provided that it causes no appreciable damage to any other State of the Basin."

(17) The United Nations Conference on the Human Environment, held in 1972, adopted the Declaration on the Human Environment (Stockholm Declaration), 109/ Principle 21 of which provides:

> "Principle 21
>
> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

108/ Text reproduced in OAS, Ríos y Lagos Internacionales (Utilización para fines agrícolas e industriales), 4th ed. rev. (OEA/Ser.I/VI, CIJ-75 Rev.2) (Washington (D.C.), 1971), pp. 183-186; extracts in Yearbook ... 1974, vol. II (Part Two), pp. 322-324, document A/CN.4/274, para. 326.

109/ Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), chap. I.

The Conference also adopted an "Action Plan for the Human Environment", 110/ Recommendation 51 of which provides:

> "Recommendation 51
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> "It is recommended that Governments concerned consider the creation of river-basin commissions or other appropriate machinery for cooperation between interested States for water resources common to more than one jurisdiction.
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> ...
>
> (b) The following principles should be considered by the States concerned when appropriate:
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> ...
>
> (ii) The basic objective of all water resource use and development activities from the environmental point of view is to ensure the best use of water and to avoid its pollution in each country;
>
> (iii) The net benefits of hydrologic regions common to more than one national jurisdiction are to be shared equitably by the nations affected;
>
> ..."

(18) The "Mar del Plata Action Plan", adopted by the United Nations Water Conference, held at Mar del Plata (Argentina) in 1977, 111/ contains a number of recommendations and resolutions concerning the management and utilization of water resources. Recommendation 7 calls upon States to frame "effective legislation ... to promote the efficient and equitable use and protection of water and water-related ecosystems". 112/ With regard to "international co-operation", the Action Plan provides, in Recommendations 90 and 91:

> "90. It is necessary for States to cooperate in the case of shared water resources in recognition of the growing economic, environmental and physical interdependencies across international frontiers. Such cooperation, in accordance with the Charter of the United Nations and principles of international law, must be exercised on the basis of the

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110/ Ibid., chap. II, sect. B.

111/ Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977 (United Nations publication, Sales No. E.77.II.A.12), part one.

112/ Ibid., p. 11.

> equality, sovereignty and territorial integrity of all States, and taking due account of the principle expressed, inter alia, in principle 21 of the Declaration of the United Nations Conference on the Human Environment.
>
> 91. In relation to the use, management and development of shared water resources, national policies should take into consideration the right of each State sharing the resources to equitably utilize such resources as the means to promote bonds of solidarity and cooperation." 113/

(19) In a report submitted in 1971 to the Committee on Natural Resources of the Economic and Social Council, the Secretary-General recognized that: "Multiple, often conflicting uses and much greater total demand have made imperative an integrated approach to river basin development in recognition of the growing economic as well as physical interdependencies across national frontiers." 114/ The report went on to note that international water resources, which were defined as water in a natural hydrological system shared by two or more countries, offered "a unique kind of opportunity for the promotion of international amity. The optimum beneficial use of such waters calls for practical measures of international association where all parties can benefit in a tangible and visible way through cooperative action." 115/

(20) The Asian-African Legal Consultative Committee in 1972 created a Standing Sub-Committee on international rivers. In 1973, the Sub-Committee recommended to the plenum that it consider the Sub-Committee's report at an opportune time at a future session. The revised draft propositions submitted by the Sub-Committee's Rapporteur follow closely the Helsinki Rules adopted in 1966 by the International Law Association, 116/ which are discussed below. Proposition III provides in part:

> "1. Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.

113/ Ibid., p. 53.

114/ E/C.7/2/Add.6, para. 1.

115/ Ibid., para. 3.

116/ See ILA, Report of the Fifty-Second Conference, Helsinki (1966), p. 484.

> "2. What is a reasonable and equitable share is to be determined by the interested basin States by considering all the relevant factors in each particular case. 117/

(21) International non-governmental organizations have reached similar conclusions. At its Salzburg session, in 1961, the Institute of International Law adopted a resolution concerning the non-navigational uses of international watercourses. 118/ This resolution, entitled "Utilization of non-maritime international waters (except for navigation)" provides in part for the right of each watercourse State to utilize the waters of a river that traverse or border its territory and for dispute settlement on the basis of equity should disagreements arise.

(22) The International Law Association (ILA) has prepared a number of drafts relating to the topic of the non-navigational uses of international watercourses. 119/ Perhaps the most notable of these for present purposes is

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117/ The next paragraph of proposition III contains a non-exhaustive list of 10 "relevant factors which are to be considered" in determining what constitutes a reasonable and equitable share. See Asian-African Legal Consultative Committee, Report of the Fourteenth Session held at New Delhi (10-18 January 1973) (New Delhi), pp. 7-14; text reproduced in Yearbook ... 1974, vol. II (Part Two), pp. 339-340, document A/CN.4/274, para. 367. The Committee's work on the law of international rivers was suspended in 1973, following the Commission's decision to take up the topic. However, in response to urgent requests, the topic was again placed on the Committee's agenda at its twenty-third session, held at Tokyo in May 1983, in order to monitor progress in the work of the Commission. See the statements made by the Committee's observers at the Commission's thirty-sixth session (Yearbook ... 1984, vol. I, p. 334, 1869th meeting, para. 42) and thirty-seventh session (Yearbook ... 1985, vol. I, p. 167, 1903rd meeting, para. 21).

118/ Annuaire de l'Institut de droit international, 1961 (Basel), vol. 49, tome II, pp. 381-384; reproduced in Yearbook ... 1974, vol. II (Part Two), p. 202, document A/5409, para. 1076. The resolution, which was based on the final report of the Rapporteur, Juraj Andrassy, submitted at the Institute's Neuchâtel session in 1959 (Annuaire de l'Institut de droit international, 1959 (Basel), vol. 48, tome I, pp. 319 et seq.), was adopted by 50 votes to none, with one abstention.

119/ The first of these drafts was the resolution adopted by the Association at its Forty-Seventh Conference, held at Dubrovnik in 1956, and among the most recent was the resolution on the law of international groundwater resources which it adopted at its Sixty-second Conference, held at Seoul in 1986. See part II of the report of the Committee on International Water Resources Law, entitled "The law of international ground-water resources" (ILA, Report of the Sixty-Second Conference, Seoul, 1986, pp. 238 et seq.).

that entitled "Helsinki Rules on the Uses of the Waters of International Rivers", adopted by the Association at its Fifty-second Conference, held at Helsinki in 1966. 120/ Chapter 2 of the Helsinki Rules, entitled "Equitable utilization of the waters of an international drainage basin", contains the following provision:

"Article IV

> "Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin."

(23) Decisions of international courts and tribunals lend further support to the principle that a State may not allow its territory to be used in such a manner as to cause injury to other States. 121/ In the context of the non-navigational uses of international watercourses, this is another way of saying that watercourse States have equal and correlative rights to the uses and benefits of the watercourse. An instructive parallel can be found in the decisions of municipal courts in cases involving competing claims in federal States. 122/

(24) The foregoing survey of legal materials, although of necessity brief, reflects the tendency of practice and doctrine on this subject. It is recognized that all the sources referred to are not of the same legal value. However, the survey does provide an indication of the wide-ranging and consistent support for the rules contained in article 5. Indeed, the rule of equitable and reasonable utilization rests on sound foundations and provides a

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120/ For the texts of the Helsinki Rules and the commentaries thereto, see ILA, Report of the Fifty-Second Conference, Helsinki, 1966, pp. 484 et seq.; reproduced in part in Yearbook ... 1974, vol. II (Part Two), pp. 357 et seq., document A/CN.4/274, para. 405.

121/ See the discussion of international judicial decisions and arbitral awards, including the River Oder case, the Diversion of Water from the Meuse case, the Corfu Channel case, the Lake Lanoux arbitration, the Trail Smelter arbitration and other arbitral awards concerning international watercourses, in the previous Special Rapporteur's second report (see footnote 98, paras. 100-133).

122/ See the decisions of municipal courts discussed in the previous Special Rapporteur's second report, ibid., paras. 164-168.

basis for the duty of States to participate in the use, development and protection of an international watercourse in an equitable and reasonable manner.

Article 6

Factors relevant to equitable and reasonable utilization

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

(a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;

(b) the social and economic needs of the watercourse States concerned;

(c) the population dependent on the watercourse in each watercourse State;

(d) the effects of the use or uses of the watercourse in one watercourse State on other watercourse States;

(e) existing and potential uses of the watercourse;

(f) conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;

(g) the availability of alternatives, of corresponding value, to a particular planned or existing use.

2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

Commentary

(1) The purpose of article 6 is to provide for the manner in which States are to implement the rule of equitable and reasonable utilization contained in article 5. The latter rule is necessarily general and flexible, and requires for its proper application that States take into account concrete factors pertaining to the international watercourse in question, as well as to the needs and uses of the watercourse States concerned. What is an equitable and reasonable utilization in a specific case will therefore depend on a weighing of all relevant factors and circumstances. This process of assessment is to

be performed, in the first instance at least, by each watercourse State, in order to assure compliance with the rule of equitable and reasonable utilization laid down in article 5.

(2) Paragraph 1 of article 6 provides that "utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances", and sets forth an indicative list of such factors and circumstances. This provision means that, in order to assure that their conduct is in conformity with the obligation of equitable utilization contained in article 5, watercourse States must take into account, in an ongoing manner, all factors that are relevant to ensuring that the equal and correlative rights of other watercourse States are respected. However, article 6 does not exclude the possibility of technical commissions, joint bodies or third parties also being involved in such assessments, in accordance with any arrangements or agreements accepted by the States concerned.

(3) The list of factors contained in paragraph 1 is indicative, not exhaustive. The wide diversity of international watercourses and of the human needs they serve makes it impossible to compile an exhaustive list of factors that may be relevant in individual cases. Some of the factors listed may be relevant in a particular case while others may not be, and still other factors may be relevant which are not contained in the list. No priority or weight is assigned to the factors and circumstances listed, since some of them may be more important in certain cases while others may deserve to be accorded greater weight in other cases.

(4) Paragraph 1 (a) contains a list of natural or physical factors. These factors are likely to influence certain important characteristics of the international watercourse itself, such as quantity and quality of water, rate of flow, and periodic fluctuations in flow. They also determine the physical relation of the watercourse to each watercourse State. "Geographic" factors include the extent of the international watercourse in the territory of each watercourse State; "hydrographic" factors relate generally to the measurement, description and mapping of the waters of the watercourse; and "hydrological" factors relate, inter alia, to the properties of the water, including water flow, and to its distribution, including the contribution of water to the watercourse by each watercourse State. Paragraph 1 (b) concerns the water-related social and economic needs of watercourse States. Paragraph 1 (c) is intended to note the importance of account being taken of

both the size of the population dependent on the watercourse and the degree or extent of their dependency. Paragraph 1 (d) relates to whether uses of an international watercourse by one watercourse State will have effects on other watercourse States, and in particular whether such uses interfere with uses by other watercourse States. Paragraph 1 (e) refers to both existing and potential uses of the international watercourse in order to emphasize that neither is given priority, while recognizing that one or both factors may be relevant in a given case. Paragraph 1 (f) sets out a number of factors relating to measures that may be taken by watercourse States with regard to an international watercourse. The term "conservation" is used in the same sense as in article 1; the term "protection" is used in the same sense as in article 5; the term "development" refers generally to projects or programmes undertaken by watercourse States to obtain benefits from a watercourse or to increase the benefits that may be obtained therefrom; and the expression "economy of use" refers to the avoidance of unnecessary waste of water. Finally, paragraph 1 (g) relates to whether there are available alternatives to a particular planned or existing use, and whether those alternatives are of a value that corresponds to that of the planned or existing use in question. The subparagraph calls for an inquiry as to whether there exist alternative means of satisfying the needs that are or would be met by an existing or planned use. The alternatives may thus take the form not only of other sources of water supply, but also of other means - not involving the use of water - of meeting the needs in question, such as alternative sources of energy or means of transport. The term "corresponding" is used in its broad sense to indicate general equivalence in value. The expression "corresponding value" is thus intended to convey the idea of generally comparable feasibility, practicability and cost-effectiveness.

(5) Paragraph 2 anticipates the possibility that, for a variety of reasons, the need may arise for watercourse States to consult with each other with regard to the application of article 5 or paragraph 1 of article 6. Examples of situations giving rise to such a need include natural conditions, such as a reduction in the quantity of water, as well as those relating to the needs of watercourse States, such as increased domestic, agricultural or industrial needs. The paragraph provides that watercourse States are under an obligation to "enter into consultations in a spirit of co-operation". As indicated in paragraph (6) of the commentary to article 5, article 8 spells out in greater detail the nature of the general obligation of watercourse States to

cooperate. This paragraph enjoins States to enter into consultations, in a spirit of cooperation, concerning the use, development or protection of an international watercourse, in order to respond to the conditions that have given rise to the need for consultations. Under the terms of this provision, the obligation to enter into consultations is triggered by the fact that a need for such consultations has arisen. While this implies an objective standard, the requirement that watercourse States enter into consultations "in a spirit of co-operation" indicates that a request by one watercourse State to enter into consultations may not be ignored by other watercourse States.

(6) Several efforts have been made at the international level to compile lists of factors to be used in giving the principle of equitable utilization concrete meaning in individual cases. Article IV of the Helsinki Rules adopted by the International Law Association 123/ deals with equitable utilization (see para. (22) of the commentary to art. 5), and article V concerns the manner in which "a reasonable and equitable share" is to be determined, reading:

> "Article V
>
> "1. What is a reasonable and equitable share within the meaning of article IV is to be determined in the light of all the relevant factors in each particular case.
>
> "2. Relevant factors which are to be considered include, but are not limited to:
>
> (a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;
>
> (b) the hydrology of the basin, including in particular the contribution of water by each basin State;
>
> (c) the climate affecting the basin;
>
> (d) the past utilization of the waters of the basin, including in particular existing utilization;
>
> (e) the economic and social needs of each basin State;
>
> (f) the population dependent on the waters of the basin in each basin State;
>
> (g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;

123/ See footnote 120 above.

(h) the availability of other resources;

(i) the avoidance of unnecessary waste in the utilization of waters of the basin;

(j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and

(k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State.

"3. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole."

(7) In 1958, the United States Department of State issued a Memorandum on "Legal aspects of the use of systems of international waters". The Memorandum, which was prepared in connection with discussions between the United States and Canada concerning proposed diversions by Canada from certain boundary rivers, also contains an illustration of factors to be taken into account in the use of an international watercourse in a just and reasonable manner. 124/

(8) Finally, in 1973, the Rapporteur of the Asian-African Legal Consultative Committee's Sub-Committee on international rivers submitted a set of revised draft propositions. In proposition III, paragraphs 1 and 2 deal with equitable utilization (see para. (20) of the commentary to art. 5 above), and paragraph 3 deals with the matter of relevant factors. 125/

(9) The Commission is of the view that an indicative list of factors is necessary to provide guidance for States in the application of the rule of equitable and reasonable utilization set forth in article 5. An attempt has been made to confine the factors to a limited, non-exhaustive list of general considerations that will be applicable in many specific cases. Nevertheless, it perhaps bears repeating that the weight to be accorded to individual factors, as well as their very relevance, will vary with the circumstances.

124/ United States of America, Legal aspects of the use of systems of international waters with reference to Columbia-Kootenay river system under customary international law and the Treaty of 1909, Memorandum of the State Department of 21 April 1958, 85th Congress, 2nd session, Senate document No. 118 (Washington (D.C.), 1958), p. 90.

125/ See footnote 117 above.

Article 7

Obligation not to cause significant harm

1. Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States.

2. Where, despite the exercise of due diligence, significant harm is caused to another watercourse State, the State whose use causes the harm shall, in the absence of agreement to such use, consult with the State suffering such harm over:

(a) the extent to which such use is equitable and reasonable taking into account the factors listed in article 6;

(b) the question of ad hoc adjustments to its utilization, designed to eliminate or mitigate any such harm caused and, where appropriate, the question of compensation.

Commentary

(1) The Commission in this article is setting forth a process aimed at avoiding significant harm as far as possible while reaching an equitable result in each concrete case. Optimal use of finite water resources of an international watercourse is considered in light of the interests of each watercourse State concerned. This is in accord with emphasis throughout the articles generally and in Part III in particular on consultations and negotiations concerning planned measures.

(2) The approach of the Commission was based on three conclusions: first, that article 5 alone did not provide sufficient guidance for States in cases where harm was a factor; second, that States must exercise due diligence to utilize a watercourse in such a way as not to cause significant harm, third, that the fact that an activity involves significant harm, would not of itself necessarily constitute a basis for barring it. In certain circumstances "equitable and reasonable utilization" of an international watercourse may still involve significant harm to another watercourse State. Generally, in such instances, the principle of equitable and reasonable utilization remains the guiding criterion in balancing the interests at stake.

(3) Paragraph 1 sets forth the general obligation for watercourse States to exercise due diligence in their utilization of an international watercourse in such a way as not to cause significant harm to other watercourse States.

(4) "Due diligence" has been defined to mean: "... a diligence proportioned to the magnitude of the subject and to the dignity and strength of the power

which is exercising it ..."; and "such care as governments ordinarily employ in their domestic concerns". 126/ The obligation of due diligence contained in article 7 sets the threshold for lawful State activity. It is not intended to guarantee that in utilizing an international watercourse significant harm would not occur. 127/ It is an obligation of conduct, not an obligation of result. What the obligation entails is that a watercourse State whose use causes significant harm can be deemed to have breached its obligation to exercise due diligence so as not to cause significant harm only when it has intentionally or negligently caused the event which had to be prevented or has intentionally or negligently not prevented others in its territory from causing that event or has abstained from abating it. 128/ Therefore, "[t]he State may be responsible ... for not enacting necessary legislation, for not enforcing its laws ..., or for not preventing or terminating an illegal activity, or for not punishing the person responsible for it". 129/

(5) An obligation of due diligence, as an objective standard, can be deduced from treaties governing the utilization of international watercourses. For example, the Indus Treaty between India and Pakistan provides in article 4, paragraph 10 that:

126/ The Geneva Arbitration (The Alabama case) reported in J.B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party, vol. I (1898), pp. 572-73 and 612 respectively.

127/ See generally P.M. Dupuy, La responsibilité internationale des Etats pour les dommages d'origine technologique et industrielle (1976) and "La responsibilité internationale des Etats pour les dommages causés par les pollutions transfontières", in OECD, Aspects juridiques de la pollution transfrontière (1977); Charles B. Bourne, "The International Law Commission's Draft Articles on the Law of International Watercourses: Principles and Planned Measures", Colorado Journal of International Environmental Law and Policy, vol. 3, pp. 65 to 92 (1992); and P.K. Wouters, "Allocation of the non-navigational uses of international watercourses: Efforts at codification and the experience of Canada and the United States", Canadian Yearbook of International Law, vol. XXX (1992), pp. 43 et seq.

128/ J.G. Lammers, Pollution of International Watercourses, (1984), p. 348.

129/ The American Law Institute, Restatement of the Law, The Foreign Relations Law of the United States, vol. 2 (1986), Section 601, comment (d), p. 105.

> "Each party declares its intention to prevent, as far as practicable, undue pollution of the waters of the rivers which might affect adversely uses similar in nature to those to which the waters were put on effective date, and agrees to take all reasonable measures to ensure that, before any sewage or industrial waste is allowed to flow into the rivers, it will be treated, where necessary, in such a manner as not materially to affect those uses: Provided that the criterion of reasonableness shall be the customary practice to similar situations on the rivers. 130/ (Emphasis supplied).

(6) An obligation of due diligence can also be deduced from various multilateral conventions. Article 194, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea 131/ provides that "States shall take ... all measures ... that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities ...". Under article 1 of the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the Contracting States are obliged "... to take all practical steps to prevent the pollution of the sea by the dumping of waste and other matter ...". 132/ Article 2 of the 1985 Vienna Convention for the Protection of the Ozone Layer 133/ obliges the Parties to "take all appropriate measures ... to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer". Article 7, paragraph 5, of the 1988 Wellington Convention on the Regulation of Antarctic Mineral Resource Activities 134/ provides that "[e]ach party shall exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any Antarctic

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130/ See Legislative Texts United Nations publication, Sales No. 63.V.4, p. 305.

131/ United Nations publication, Sales No. E.83.V.5.

132/ United Nations, Treaty Series, vol. 1046, p. 120; also reproduced in International Legal Materials, vol. XI (1972), pp. 1294 et seq.

133/ Document UNEP/IG.53/5; also reproduced in International Legal Materials, vol. XXVI (1987), p. 1529.

134/ Document AMR/SCM/88/78 (2 June 1988); also reproduced in International Legal Materials, vol. XXVII (1988), pp. 872 et seq.

mineral resource activities contrary to the objectives and principles of this Convention". The Convention on Environmental Impact Assessment in a Transboundary Context also provides in article 1, paragraph 2 that "Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities ... that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation ...". 135/ Furthermore, the 1992 Convention on the protection and use of transboundary watercourses and international lakes provides in article 2, paragraph 1 that "The Parties shall take all appropriate measures to prevent, control and reduce any transboundary impact". 136/

(7) The obligation of due diligence contained in article 7 was recently dealt with in a dispute between Germany and Switzerland over the latter's failure to require a pharmaceutical company to take certain safety measures and the resulting pollution of the Rhine river. The Swiss Government acknowledged its lack of due diligence in preventing the accident through adequate regulation of its own pharmaceutical industries. 137/

(8) A watercourse State can be deemed to have violated its due diligence obligation only if it knew or ought to have known that the particular use of an international watercourse would cause significant harm to other watercourse States. 138/

135/ Document E/ECE/1250 (25 February 1991).

136/ UNVWA/R.53 and Add.1.

137/ See New York Times (11 November 1986), p. A1, (12 November 1986), p. A8, (13 November 1986), p. A3. For a full discussion of this situation, see Riccardo-Pisillo-Mazzeschi "Forms of International Responsibility for Environmental Harm" in International Responsibility for Environmental Harm (Francesco Francioni and Tullio Scovazzi, eds.) (1991), p. 31. See also Barron, "After Chernobyl: Liability for Nuclear Accidents under International Law", 25 Columbia Journal of Transnational Law (1987), pp. 652 et seq.

138/ J.G. Lammers, op. cit. (see footnote 128 above), p. 349.

(9) As observed by the International Court of Justice in the Corfu Channel case:

> "... it cannot be concluded from the mere fact of control exercised by a State over its territory that that State necessarily knew or ought to have known, of an unlawful act perpetuated therein, nor that it necessarily knew or should have known the authors. This fact, by itself or apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof." 139/

(10) Paragraph 2 deals with a situation where, despite the exercise of due diligence in the utilization of an international watercourse, a use still causes significant harm to other watercourse States. In that circumstance, the provisions of paragraph 2 require that, unless there is an agreement to such use, the State whose use causes the harm consult with the watercourse States which are suffering the harm. The subject-matter of the consultations is stipulated in subparagraphs (a) and (b) of paragraph 2.

(11) The words "in the absence of agreement to such use" reflect the fact that where the watercourse States concerned have already agreed to such use, the obligations contained in subparagraphs (a) and (b) of paragraph 2 do not arise. In the absence of such agreement, however, the watercourse State suffering significant harm may invoke the provisions in subparagraphs (a) and (b) of paragraph 2 thereof.

(12) The process of reaching agreement on uses of watercourses has been dealt with by a commentator as follows:

> "Frequently, when a State contemplates a use which is expected to cause serious and lasting injury to the interests of another State in the river, development has not been undertaken until there has been agreement between the States. Such agreements do not follow any particular pattern but resolve immediate problems on an equitable basis." 140/

This process is reflected and strengthened by draft article 12 and the other articles relating to notification, exchange of information, etc. contained in Part III of the draft articles.

(13) The process called for by paragraph 2 is in several respects analogous to the process followed by the International Court of Justice in the Fisheries

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139/ I.C.J. Reports (1949), p. 18.

140/ C. Eagleton, "The law and uses of international rivers", as quoted in Whiteman's Digest of International Law (1966), vol. II, pp. 874-875.

Jurisdiction case (United Kingdom v. Iceland) merits (1974). 141/ In that case, the Court found the existence of competing rights on the part of the United Kingdom and Iceland. The Court laid down certain general criteria to be applied, analogous to article 6 of the present draft articles, and went on to state:

> "The most appropriate method for the solution of the dispute was clearly that of negotiation. Its objective should be the delimitation of the rights and interests of the Parties ... 142/ The obligation to negotiate thus flows from the very nature of the respective rights of the parties; [and] corresponds to the Principles and provisions of the Charter of the United Nations concerning peaceful settlement of disputes ... 143/ The task before ... [the Parties] will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other, [to] ... the facts of the particular situation, and having regard to the interests of other States with established ... rights 144/

(14) Subparagraph (a) of paragraph 2 obliges the parties to consult in order to determine whether the use of the watercourse has been equitable and reasonable taking into account, *inter alia*, the non-exhaustive list of factors referred to in article 6. The burden of proof for establishing that a particular use is equitable and reasonable lies with the State whose use of

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141/ I.C.J. Reports (1974), pp. 3 et seq. It is recognized that the process called for by paragraph 2 of article 7 is one of "consultation". The reference by analogy to the process used in the Fisheries Jurisdiction case with its reference to "negotiation" is not intended to put a gloss on the term used in paragraph 2.

142/ Ibid., p. 31, para. 73.

143/ Ibid., p. 32, para. 75.

144/ Ibid., p. 33, para. 78. See also The Salzburg Resolution on the Use of International Non-Maritime Waters, 49-II Annuaire de l'Institut de droit international, session de Salzbourg 1961; Charles B. Bourne, "The International Law Commission's Draft Articles on the Law of International Watercourses; Principles and Planned Measures" Colorado Journal of International Environmental Law and Policy, vol. 3, pp. 65 to 92 (1992); and P.K. Wouters, The Canadian Yearbook of International Law, vol. XXX (1992), pp. 80-86.

the watercourse is causing significant harm. 145/ A use which causes significant harm to human health and safety is understood to be inherently inequitable and unreasonable. In the view of several members of the Commission it was also important to recognize that it is, at the least, highly unlikely that any other form of extreme harm could be balanced by the benefits derived from the activity.

(15) Where, as in the Fisheries Jurisdiction case, there is a conflict of uses due in the case of watercourses, for example, to the quantity or quality of the water, it may be that all reasonable and beneficial uses cannot be realized to their full extent.

(16) The decision of the Court in the Donauversinkung case is also instructive where it states: "The interests of the States in question must be weighed in an equitable manner one against another. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by the one to the injury caused to the other". 146/

(17) Subparagraph (b) of paragraph 2 requires the States to consult to see whether ad hoc adjustments should be made to the utilization that is causing

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145/ "The plaintiff state starts with the presumptive rule in its favour that every state is bound to use the waters of rivers flowing within its territory in such a manner as will not cause substantial injury to a co-riparian state. Having proved such substantial injury, the burden then will be upon the defendant state to establish an appropriate defense, except in those cases where damage results from extra-hazardous pollution and liability is strict. This burden falls on the defendant state by implication from its exclusive sovereign jurisdiction over waters flowing within its territory." See The Law of International Drainage Basins, A.H. Garretson, R.D. Hayton and C.J. Olmstead, eds. (Dobbs Ferry, N.Y., Oceana Publications, 1967), p. 113.

146/ Wurtenberg and Prussia v. Baden (Donauversinkung case) (1927) Entscheidungen des Reichsgerichts in Zivilsachen (Berlin, de Gruyter), vol. 116 (1927), Anhang: Entscheidungen des Staatsgerichtshofs, p. 18, Annual Digest of Public International Law Cases, (1927-1928) (London, 1931) p. 131; see also Kansas v. Colorado (1907) 206 US 100, and Washington v. Oregon (1936) 297 US 517, ILA Report of the Sixty-Second Conference, (Seoul), 1978, Part III pp. 275-278, article 1 of the "Complementary Rules Applicable to International Water Resources" states as follows: "A basin State shall refrain from and prevent acts or omissions within its territory that will cause substantial injury to any co-basin State, provided that the application of the principle of equitable utilization as set forth in Article IV of the Helsinki Rules does not justify an exception in a particular case. Such an exception shall be determined in accordance with Article V of the Helsinki Rules".

significant harm in order to eliminate or reduce the harm; and whether compensation should be paid to those suffering the harm.

(18) The consultations must be conducted in the light of the particular circumstances and would include, in addition to the factors relevant in subparagraph (a), such factors as the extent to which adjustments are economically viable, the extent to which the injured State would also derive benefits from the activity in question 147/ such as a share of hydroelectric power being generated, flood control, improved navigation, etc. In this connection the payment of compensation is expressly recognized as a means of balancing the equities in appropriate cases. 148/

(19) The concept of a balancing of interests is expressed in paragraph (9) of the commentary to article 5 above, which reads as follows:

> "... where the quantity or quality of water is such that all the reasonable and beneficial uses of all watercourse States cannot be fully realized, a 'conflict of uses' results. In such a case, international practice recognizes that some adjustments or accommodations are required in order to preserve each watercourse State's equality of right. These adjustments or accommodations are to be arrived at on the basis of equity, and can best be achieved on the basis of specific watercourse agreements."

(20) This concept is reflected in Recommendation 51 adopted by the Stockholm Conference on the Human Environment (1972) which commends the principle that

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147/ See Donauversinkung case, ibid.

148/ See Treaty between Canada and the United States relating to Cooperative Development of the Water Resources of the Columbia River Basin, United Nations, Treaty Service, vol. 542, p. 246, Agreement between the United Arab Republic and the Republic of Sudan for the full utilization of the Nile Waters (1960) ibid., vol. 453, p. 51 and its 1929 predecessor, 93 League of Nations, Treaty Series, vol. XCIII, p. 44. See also the Agreement between the Austrian Federal Government and the Bavarian State Government concerning the Division of Water in the Rissbach, Durrach and Walchen Districts, reached on 29 June 1948 and concluded on 16 October 1950, Legislative Texts (United Nations publication, Sales No. 63.V.4), pp. 469-470, the 1954 Drava Agreement between Austria and Yugoslavia, United Nations Document ibid., p. 513. See further the 1966 Lake Constance Agreement between Austria, the Federal Republic of Germany and Switzerland, United Nations Document ibid., p. 774, article 4 of the Salzburg resolution on the use of international non-maritime water, 49-II, Annuaire de l'institut de droit international, session de Salzbourg 1961.

"the net benefits of hydrologic regions common to more than one national jurisdiction are to be shared equitably by the nations concerned". 149/

(21) If consultations do not lead to a solution, the dispute settlement procedures contained in article 33 of the present articles will apply. These procedures have been added by the Commission on second reading in the recognition of the complexity of the issues and the inherent vagueness of the criteria to be applied. The situation is well described by the Lake Lanoux Tribunal which stated:

> "It is for each State to evaluate in a reasonable manner and in good faith the situations and rules which will involve it in controversies; its evaluation may be in contradiction with that of other States; in that case, should a dispute arise the Parties normally seek to resolve it by negotiation or, alternatively, by submitting to the authority of a third party." 150/

(22) Some members of the Commission indicated that they did not deem it useful to include any provisions along the lines of article 7 whether as presently drafted or as drafted in the 1991 text. Others believed that it was essential for the Commission to address the matter either as done in the 1991 text or the present text. The latter view prevailed.

(23) Some members expressed their reservations with regard to the article, indicating preference for the text adopted on first reading.

Article 8

General obligation to cooperate

> Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse.

Commentary

(1) Article 8 lays down the general obligation of watercourse States to cooperate with each other in order to fulfil the obligations and attain the objectives set forth in the draft articles. Cooperation between watercourse States with regard to their utilization of an international watercourse is an

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149/ See footnote 109 above.

150/ United Nations, Reports of International Arbitral Awards, pp. 310-311.

important basis for the attainment and maintenance of an equitable allocation of the uses and benefits of the watercourse and for the smooth functioning of the procedural rules contained in Part III of the draft.

(2) Article 8 indicates both the basis and the objectives of cooperation. With regard to the basis of cooperation, the article refers to the most fundamental principles upon which cooperation between watercourse States is founded. Other relevant principles include those of good faith and good-neighbourliness. As to the objectives of cooperation, the Commission considered whether these should be set forth in some detail. It came to the conclusion that a general formulation would be more appropriate, especially in view of the wide diversity of international watercourses and the uses thereof, and the needs of watercourse States. This formulation, expressed in the phrase "in order to attain optimal utilization and adequate protection of an international watercourse", is derived from the second sentence of paragraph 1 of article 5.

(3) A wide variety of international instruments call for cooperation between the parties with regard to their utilization of the relevant international watercourses. 151/ An example of an international instrument incorporating such an obligation is the Agreement of 17 July 1964 between Poland and the

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151/ A survey of international agreements, decisions of international courts and tribunals, declarations and resolutions adopted by intergovernmental organizations, conferences and meetings, and studies by intergovernmental and non-governmental organizations relating to the principle of cooperation is contained in the previous Special Rapporteur's third report, Yearbook ... 1987, vol. II (Part One), pp. 24 et seq., document A/CN.4/406 and Add.1 and 2, paras. 43-58.

Poland and the USSR concerning the use of water resources in frontier waters. 152/ Paragraph 3 of article 3 states that the purpose of the agreement is to ensure cooperation between the parties in economic, scientific and technical activities relating to the use of water resources in frontier waters. Articles 7 and 8 of the agreement provide for cooperation with regard, *inter alia*, to water projects and the regular exchange of data and information.

(4) The importance of cooperation in relation to the utilization of international watercourses and other common natural resources has been emphasized repeatedly in declarations and resolutions adopted by intergovernmental organizations, conferences and meetings, as well as in article 3 of the Charter of Economic Rights and Duties of States. 153/ For example, the General Assembly addressed the subject in

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152/ Entered into force on 16 February 1965 (United Nations, *Treaty Series*, vol. 552, p. 175). Other examples of international watercourse agreements providing for cooperation between the parties are: (a) the Convention of 16 November 1962 between France and Switzerland concerning protection of the waters of Lake Geneva against pollution (entered into force on 1 November 1963) (ibid., vol. 922, p. 49) (arts. 1-4); (b) the Agreement of 14 August 1983 between the United States of America and Mexico on cooperation for the protection and improvement of the environment in the border area (entered into force on 16 February 1984), a framework agreement encompassing boundary water resources (*International Legal Materials*) vol. XXII (1983), p. 1025) (art. 1 and annex I); (c) the Act of 26 October 1963 regarding navigation and economic cooperation between the States of the Niger Basin (Cameroon, Ivory Coast, Dahomey, Guinea, Upper Volta, Mali, Niger, Nigeria and Chad) (entered into force on 1 February 1966) (see United Nations, *Treaty Series*, vol. 587, p. 9) (art. 4); (d) the Convention relating to the status of the Senegal River and the Convention establishing the Organization for the Development of the Senegal River, both of 11 March 1972 (United Nations, Natural Resources/Water Series No. 13, op. cit., pp. 16 and 21, respectively); (e) the Convention and Statutes of 22 May 1964 relating to the development of the Chad Basin (*Official Gazette of the Federal Republic of Cameroon* (Yaoundé), vol. 4, No. 18 (15 September 1964), p. 1003; *Yearbook ... 1974*, vol. II (Part Two), pp. 290-291, document A/CN.4/274, paras. 51-56) (art. 1 of the Statutes); (f) the Indus Waters Treaty of 19 September 1960 between India and Pakistan (entered into force on 12 January 1961) (see United Nations, *Treaty Series* vol. 419, p. 125) (arts. VII and VIII). More generally, article 197 of the 1982 United Nations Convention on the Law of the Sea, entitled "Co-operation on a global or regional basis", requires States to cooperate "in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features".

153/ See General Assembly resolution 3281 (XXIX) of 12 December 1974.

of 15 December 1972 on cooperation between States in the field of the environment, and resolution 3129 (XXVIII) of 13 December 1973 on cooperation in the field of the environment concerning natural resources shared by two or more States. The former provides, in its preamble, that, "in exercising their sovereignty over their natural resources, States must seek, through effective bilateral and multilateral cooperation or through regional machinery, to preserve and improve the environment". The subject of cooperation in the utilization of common water resources and in the field of environmental protection was also addressed in the Declaration of the Stockholm Conference on the Human Environment in 1972. 154/ Principle 24 of that Declaration provides:

> "Principle 24
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> "International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States." 155/

The Mar del Plata Action Plan, adopted by the United Nations Water Conference, held at Mar del Plata in 1977, 156/ contains a number of recommendations relating to regional and international cooperation with regard to the use and development of international watercourses. For example, Recommendation 90 provides that cooperation between States in the case of international watercourses "in accordance with the Charter of the United Nations and principles of international law, must be exercised on the basis of the equality, sovereignty and territorial integrity of all States, and taking due account of the principle expressed, *inter alia*, in principle 21 of the Declaration of the United Nations Conference on the Human

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154/ See footnote 108 above.

155/ See also Recommendation 51 of the Action Plan for the Human Environment adopted by the same Conference, ibid., part one, chap. II.B, which provides for cooperation with regard specifically to international watercourses.

156/ *Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12), part one, chap. I.

Environment". 157/ In 1987, ECE adopted a set of "Principles regarding cooperation in the field of transboundary waters", 158/ Principle 2 of which provides:

> "Cooperation
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> "2. Transboundary effects of natural phenomena and human activities on transboundary waters are best regulated by the concerted efforts of the countries immediately concerned. Therefore cooperation should be established as practical as possible among riparian countries leading to a constant and comprehensive exchange of information, regular consultations and decisions concerning issues of mutual interest: objectives, standards and norms, monitoring, planning, research and development programmes and concrete measures, including the implementation and surveillance of such measures."

(5) Numerous studies by intergovernmental and international non-governmental organizations have also recognized the importance of cooperation between States in the use and development of international watercourses. 159/ An instrument expressly recognizing the importance of cooperation between States to the effectiveness of procedural and other rules concerning international watercourses is the Rules on Water Pollution in an International Drainage Basin, adopted by the International Law Association in 1982. 160/ Article 4 of the Rules provides: "In order to give effect to the provisions of these articles, States shall cooperate with the other States concerned." A forceful statement of the importance of cooperation with regard to international water resources, owing to the physical properties of water, is

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157/ Principle 21 of the Declaration on the Human Environment is reproduced in paragraph (17) of the commentary to article 5. See also Recommendation 84 of the Mar del Plata Action Plan (ibid., p. 51) and the resolutions contained in the Action Plan on "Technical cooperation among developing countries in the water sector", "River commissions" and "Institutional arrangements for international cooperation in the water sector" (ibid., pp. 76-79).

158/ See Yearbook ... 1974, vol. II (Part Two), p. 212. The preamble to the principles states: "... The following principles address only issues regarding control and prevention of transboundary water pollution, as well as flood management in transboundary waters, including general issues in this field ...".

159/ See generally the studies referred to and excerpted in Yearbook ... 1974, vol. II (Part Two), document A/5409, paras. 1069-1098; document A/CN.4/274, paras. 364-381 and 399-409.

160/ See ILA, Report of the Sixtieth Conference, Montreal, 1982.

found in Principle XII of the European Water Charter, adopted by the Committee of Ministers of the Council of Europe in 1967, 161/ which declares: "Water knows no frontiers; as a common resource it demands international co-operation." Finally, the resolution on "The pollution of rivers and lakes and international law" adopted by the Institute of International Law at its Athens session, in 1979, 162/ provides in Article IV (b) that in order to prevent water pollution, States shall use as a means "at the international level, co-operation in good faith with the other States concerned". 163/

(6) In conclusion, cooperation between watercourse States is important to the equitable and reasonable utilization of international watercourses. It also forms the basis for the regular exchange of data and information under article 9, as well as for the other parts of the draft.

Article 9

Regular exchange of data and information

1. Pursuant to article 8, watercourse States shall on a regular basis exchange readily available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not readily available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

161/ Adopted on 28 April 1967 by the Consultative Assembly of the Council of Europe (Recommendation 493 (1967)), and on 26 May 1967 by the Committee of Ministers (resolution (67) 10); text reproduced in Yearbook ... 1974, vol. II (Part Two), pp. 342-343, document A/CN.4/274, para. 373.

162/ See Annuaire de l'Institut de droit international, 1979, vol. 58-II, pp. 196 et seq.

163/ Article VII of the resolution provides that, "in carrying out their duty to cooperate, States bordering the same hydrographic basin shall, as far as practicable, especially through agreements, resort to the following ways of cooperation", including providing data concerning pollution, giving advance notification of potentially polluting activities, and consulting on actual or potential transboundary pollution problems.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

Commentary

(1) Article 9 sets forth the general minimum requirements for the exchange between watercourse States of the data and information necessary to ensure the equitable and reasonable utilization of an international watercourse. Watercourse States require data and information concerning the condition of the watercourse in order to apply article 6, which calls for watercourse States to take into account "all relevant factors and circumstances" in implementing the obligation of equitable utilization laid down in article 5. The rules contained in article 9 are, of course, residual: they apply in the absence of particularized regulation of the subject in an agreement of the kind envisaged in article 3, i.e. one relating to a specific international watercourse. Indeed, the need is clear for watercourse States to conclude such agreements among themselves in order to provide, inter alia, for the collection and exchange of data and information in the light of the characteristics of the international watercourse involved, as well as of their special requirements and circumstances. The smooth and effective functioning of the regime envisaged in article 9 is dependent upon cooperation between watercourse States. The rules in this article thus constitute a specific application of the general obligation to cooperate laid down in article 8, as reflected in the opening phrase of paragraph 1.

(2) The requirement of paragraph 1 that data and information be exchanged on a regular basis is designed to ensure that watercourse States will have the facts necessary to enable them to comply with their obligations under articles 5, 6 and 7. The data and information may be transmitted directly or indirectly. In many cases, watercourse States have established joint bodies entrusted, inter alia, with the collection, processing and dissemination of

data and information of the kind referred to in paragraph 1. 164/ But the States concerned are, of course, free to utilize for this purpose any mutually acceptable method.

(3) The Commission recognizes that circumstances such as an armed conflict or the absence of diplomatic relations may raise serious obstacles to the direct exchange of data and information, as well as to a number of the procedures provided for in articles 11 to 19. The Commission decided that this problem would be best dealt with through a general saving clause specifically providing for indirect procedures, which has taken the form of article 30.

(4) In requiring the "regular" exchange of data and information, article 9 provides for an ongoing and systematic process, as distinct from the ad hoc provision of information concerning planned measures envisaged in part III of the draft.

164/ For illustrative lists of such bodies and discussions thereof, see (a) Yearbook ... 1974, vol. II (Part Two), pp. 351 et seq., document A/CN.4/274, paras. 382-398; (b) the Proceedings of the United Nations Interregional Meeting of International River Organizations, held at Dakar (Senegal) from 5 to 14 May 1981, Experiences in the Development and Management of International River and Lake Basins, Natural Resources/Water Series No. 10 (United Nations publication, Sales No. E.82.II.A.17), part three; (c) N. Ely and A. Wolman, "Administration", in The Law of International Drainage Basins (1967), pp. 125-133; (d) United Nations, Management of International Water Resources: Institutional and Legal Aspects, Natural Resources/Water Series No. 1 (Sales No. E.75.II.A.2), annex IV; (e) T. Parnall and A.E. Utton, "The Senegal Valley Authority: A unique experiment in international river basin planning", Indiana Law Journal, vol. 51 (1975-1976), pp. 254 et seq.

Notable among these administrative mechanisms are: in Africa: the Lake Chad Basin Commission, the Niger Basin Authority (formerly River Niger Commission), the Permanent Joint Technical Commission for Nile Waters (Egypt and Sudan) and the Organization for the Management and Development of the Kagera River Basin; in America: the Intergovernmental Coordinating Committee of the River Plate Basin, the International Joint Commission (Canada and United States of America) and the International Boundary and Water Commission (United States of America and Mexico); in Asia: The Committee for Coordination of Investigations of the Lower Mekong Basin, the Permanent Indus Commission (India and Pakistan), the Joint Rivers Commission (India and Bangladesh) and the Helmand River Delta Commission (Afghanistan and Iran); in Europe: the Danube Commission, the International Commission for the Protection of the Moselle against Pollution, the International Commission for the Protection of the Rhine against Pollution and the Joint Finnish-Soviet Commission on the Utilization of Frontier Watercourses.

(5) Paragraph 1 requires that watercourse States exchange data and information that is "readily available". 165/ This expression is used to indicate that, as a matter of general legal duty, a watercourse State is obligated to provide only such information as is readily at its disposal, for example that which it has already collected for its own use or is easily accessible. 166/ In a specific case, whether data and information was "readily" available would depend upon an objective evaluation of such factors as the effort and cost its provision would entail, taking into account the human, technical, financial and other relevant resources of the requested watercourse State. The terms "readily", as used in paragraphs 1 and 2, are thus terms of art having a meaning corresponding roughly to the expression "in the light of all the relevant circumstances" or to the word "feasible", rather than, for example, "rationally" or "logically".

(6) In the absence of agreement to the contrary, watercourse States are not required to process the data and information to be exchanged. Under paragraph 3 of article 9, however, they are to employ their best efforts to provide the information in a form that is usable by the States receiving it.

165/ Art. XXIX, para. 1 of the Helsinki Rules employs the expression "relevant and reasonably available": see ILA, Report of the Fifty-Second Conference, Helsinki, 1966.

166/ See the commentary to art. XXIX, para. 1, of the Helsinki Rules, which states:

> "The reference to 'relevant and reasonably available information' makes it clear that the basin State in question cannot be called upon to furnish information which is not pertinent and cannot be put to the expense and trouble of securing statistics and other data which are not already at hand or readily obtainable. The provision of the article is not intended to prejudge the question whether a basin State may justifiably call upon another to furnish information which is not 'reasonably available' if the first State is willing to bear the cost of securing the desired information." (ibid., p. 519).

(7) Examples of instruments which employ the term "available" in reference to information to be provided are the 1960 Indus Waters Treaty between India and Pakistan 167/ and the 1986 Convention on Early Notification of a Nuclear Accident. 168/

(8) Watercourse States are required to exchange data and information concerning the "condition" of the international watercourse. This term, which also appears in article 11, has its usual meaning, referring generally to the current state or characteristics of the watercourse. As indicated by the words "in particular", the kinds of data and information mentioned, while by no means comprising an exhaustive list, are those regarded as being the most important for the purpose of equitable utilization. Although article 9 does not mention the exchange of samples, the Commission recognizes that this may indeed be of great practical value in some circumstances and should be effected as appropriate.

(9) The data and information transmitted to other watercourse States should include indications of effects upon the condition of the watercourse of present uses thereof within the State transmitting the information. Possible effects of planned uses are dealt with in articles 11 to 19.

(10) Paragraph 1 of article 9 requires the regular exchange of, inter alia, data and information of an "ecological" nature. The Commission regarded this term as being preferable to "environmental", since it relates more specifically to the living resources of the watercourse itself. The term "environmental" was thought to be susceptible of a broader interpretation, which would result in the imposition of too great a burden upon watercourse States.

167/ See United Nations, Treaty Series, vol. 419, p. 125. Article VII, para. 2, of the Treaty provides that a party planning to construct engineering works which would affect the other party materially

> "shall notify the other Party of its plans and shall supply such data relating to the work as may be available and as would enable the other Party to inform itself of the nature, magnitude and effect of the work". (emphasis added).

See article XXIX, para. 1, of the Helsinki Rules and the commentary thereto, ILA, Report of the Fifty-Second Conference, Helsinki, 1966.

168/ IAEA, Legal Series No. 14 (Vienna, 1987), p. 1. Article 2 (b) of the Convention requires the provision of "available information relevant to minimizing the radiological consequences ...".

(11) Watercourse States are required by paragraph 1 to exchange not only data and information on the present condition of the watercourse, but also related forecasts. The latter requirement is, like the former, subject to the qualification that such forecasts be "readily available". Thus watercourse States are not required to undertake special efforts in order to fulfil this obligation. The forecasts envisaged would relate to such matters as weather patterns and the possible effects thereof upon water levels and flows; foreseeable ice conditions; possible long-term effects of present use; and the condition or movement of living resources.

(12) The requirement in paragraph 1 applies even in the relatively rare instances in which no watercourse State is presently using or planning to use the watercourse. If data and information concerning the condition of the watercourse is "readily available", the Commission believed that requiring the exchange of such data and information would not be excessively burdensome. In fact, the exchange of data and information concerning such watercourses might assist watercourse States in planning for the future and in meeting development or other needs.

(13) Paragraph 2 concerns requests for data or information that is not reasonably available to the watercourse State from which it is sought. In such cases, the State in question is to employ its "best efforts" to comply with the request, i.e. it is to act in good faith and in a spirit of cooperation in endeavouring to provide the data or information sought by the requesting watercourse State.

(14) For data and information to be of practical value to watercourse States, it must be in a form which allows them to use it. Paragraph 3 therefore requires watercourse States to use their "best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization". The meaning of the expression "best efforts" is explained in paragraph (13). The expression "where appropriate" is used in order to provide a measure of flexibility, which is necessary for several reasons. In some cases, it may not be necessary to process data and information in order to render it usable by another State. In other cases, such processing may be necessary in order to ensure that the material is usable by other States, but this may entail undue burdens for the State providing the material.

(15) The need for the regular collection and exchange of a broad range of data and information relating to international watercourses has been recognized in a large number of international agreements, declarations and resolutions

adopted by intergovernmental organizations, conferences and meetings, and studies by intergovernmental and international non-governmental organizations. 169/ An example of agreements containing general provisions on the regular exchange of data and information is the 1964 Agreement between Poland and the USSR concerning the use of water resources in frontier waters, 170/ article 7, paragraph 1, of which provides:

> "1. The Contracting Parties shall establish principles of cooperation governing the regular exchange of hydrological, hydrometeorological and hydrogeological information and forecasts relating to frontier waters and shall determine the scope, programmes and methods of carrying out measurements and observation and of processing their results and also the places and times at which the work is to be done."

Other examples of agreements containing provisions on the exchange of data and information are the 1960 Indus Waters Treaty between India and Pakistan 171/ (art. VI), the 1944 Treaty between the United States of America and Mexico 172/ (art. 9 (*j*)), the Agreement of 25 November 1964 concerning the Niger River Commission and the navigation and transport on the River Niger 173/ (art. 2 (*c*)) and the Agreement of 16 September 1971 between Finland and Sweden concerning frontier rivers 174/ (chap. 9, art. 3).

(16) The regular exchange of data and information is particularly important for the effective protection of international watercourses, preservation of water quality and prevention of pollution. This is recognized in a number of

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169/ A survey of the relevant provisions of these instruments is contained in the previous Special Rapporteur's fourth report, *Yearbook ... 1988*, vol. II (Part One), pp. 205 et seq., document A/CN.4/412 and Add.1 and 2, paras. 15-26. See also article 3 of the Charter of Economic Rights and Duties of States, General Assembly resolution 3281 (XXIX) of 12 December 1974.

170/ See United Nations, *Treaty Series*, vol. 552, p. 175.

171/ Ibid., vol. 419, p. 125.

172/ Ibid., vol. 3, p. 313.

173/ Ibid., vol. 587, p. 19.

174/ Ibid., vol. 825, p. 191.

international agreements, declarations and resolutions, and studies. 175/ For example, Principle 11 (a) of the "Principles regarding co-operation in the field of transboundary waters" adopted by ECE in 1987. 176/

(17) In summary, the regular exchange by watercourse States of data and information concerning the condition of the watercourse provides those States with the material necessary to comply with their obligations under articles 5 to 7, as well as for their own planning purposes. While article 9 concerns the exchange of data and information on a regular basis, the articles in Part III, which follows, deal with the provision of information on an ad hoc basis, namely with regard to planned measures.

Article 10

Relationship between different kinds of uses

> 1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.
>
> 2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors set out in articles 5 to 7, with special regard being given to the requirements of vital human needs.

Commentary

(1) Article 10 sets forth the general principle that no use of an international watercourse enjoys inherent priority over other uses. The article also addresses the situation in which there is a conflict between different uses of an international watercourse.

(2) Since States, through agreement or practice, often give priority to a specific use or class of uses, paragraph 1 is couched in terms of a residual rule. Thus, the opening clause of the paragraph preserves any priority established by "agreement or custom" between the watercourse States concerned. The term "agreement" is used in its broad sense and would include, e.g., an arrangement or modus vivendi that had been arrived at by watercourse States. Furthermore, it is not limited to "watercourse agreements" since it is

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175/ See the examples cited in the previous Special Rapporteur's fourth report, Yearbook ... 1988, vol. II (Part One), pp. 205 et seq., document A/CN.4/412 and Add.1 and 2.

176/ Yearbook ... 1974, vol. II (Part Two), p. 212 in fine. The Principles are limited by their preamble to flood management and the prevention and control of pollution.

possible that certain uses, such as navigation, could be addressed in other kinds of agreements such as treaties of amity. The word "custom" applies to situations in which there may be no "agreement" between watercourse States but where, by tradition or in practice, they have given priority to a particular use. The reference to an "inherent priority" likewise indicates that nothing in the nature of a particular type or category of uses gives it a presumptive or intrinsic priority over other uses, leaving watercourse States free to decide to accord priority to a specific use in relation to a particular international watercourse. This applies equally to navigational uses which, according to article 1, paragraph 2, fall within the scope of the present articles "in so far as other uses affect navigation or are affected by navigation".

(3) Paragraph 2 deals with the situation in which different uses of an international watercourse conflict, or interfere, with each other but where no applicable priorities have been established by custom or agreement. In such a case, paragraph 2 indicates that the situation is to be resolved by reference to the principles and factors contained in articles 5 to 7, "with special regard being given to the requirements of vital human needs". Within the meaning of the article, therefore, a "conflict" between uses could only arise where no system of priorities governing those uses, or other means of accommodating them, had been established by agreement or custom as between the watercourse States concerned. It bears emphasis that the paragraph refers to a "conflict" between uses of an international watercourse, and not a conflict or dispute between watercourse States. 177/

(4) The principles and factors to be applied in resolving a conflict between uses of an international watercourse under paragraph 2 are those contained in articles 5, 6 and 7. The factors to be taken into account under article 6 are those that are relevant to the international watercourse in question. However, in deciding upon the manner in which such a conflict is to be resolved, watercourse States are to have "special regard ... to the requirements of vital human needs". That is, special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation. This criterion is an accentuated form of the factor contained in article 6, paragraph 1 (b), which refers to the "social and economic needs of

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177/ See also paragraph (9) of the commentary to article 5.

the watercourse States concerned". Since paragraph 2 includes a reference to article 6, the latter factor is, in any event, one of those to be taken into account by the watercourse States concerned in arriving at a resolution of a conflict between uses.

(5) While navigational uses may have enjoyed a general priority earlier in this century, 178/ States recognized the need for greater flexibility as other kinds of uses began to rival navigation in economic and social importance. A resolution adopted in 1966 by the Fourth Annual Meeting of the Inter-American Economic and Social Council at the Ministerial Level exemplifies this shift in attitude in its recognition of the importance of taking into account the variety of potential uses of a watercourse. The resolution recommends that member countries promote, for the common good, the economic utilization of the hydrographic basins and streams of the region of which they are a part, for "transportation, the production of electric power, irrigation works, and other uses, and particularly in order to control and prevent damage such as periodically occurs as the result of ... floods". 179/ In the same year, the International Law Association also concluded that no individual use enjoys general priority. Article VI of the Helsinki Rules provides that: "A use or category of uses is not entitled to any inherent preference over any other use or category of uses." 180/ The importance of preserving sufficient flexibility to ensure a supply of fresh water adequate to meet human needs in the next century was recently emphasized in the "Delft Declaration". Adopted at a symposium held in Delft, the Netherlands, 3-5 June 1991, under the sponsorship of the United Nations

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178/ Illustrative of this position is article 10, para. 1, of the 1921 Barcelona Convention and Statute on the regime of navigable waterways of international concern, League of Nations, Treaty Series, vol. VII, p. 57. Other examples may be found in the "Declaration of Montevideo", approved by the Seventh International Conference of American States in 1933, art. 5, reproduced in Yearbook ... 1974, vol. II (Part Two), p. 212, document A/5409, annex I, A; and rule II, 4, of the 1911 "Madrid resolution" of the Institute of International Law (on which art. 5 of the Montevideo Declaration was based), Annuaire de l'Institut de droit international, 1911 (Paris), vol. 24, p. 366.

179/ Resolution 24-M/66, "Control and economic utilization of hydrographic basins and streams in Latin America" (sole operative paragraph), reproduced in Yearbook ... 1974, vol. II (Part Two), p. 351, document A/CN.4/274, para. 380.

180/ ILA, Report of the Fifty-Second Conference, Helsinki, 1966, p. 491.

Development Programme (UNDP), the Declaration notes that by the year 2000 nearly half the world's population will be living in cities. It refers to the "daunting" challenge to satisfy the water needs of "exploding" metropolitan areas "given the equally increasing need for water for irrigated agriculture and the problems arising from urban and industrial pollution". The water experts at the symposium concluded that in order to satisfy human water needs "in a sustainable way, advanced measures have to be taken to protect and conserve the water and environmental resources". 181/ Such measures would often be impossible if a particular use enjoyed inherent priority. The absence of such a priority among uses will facilitate the implementation of measures designed to ensure that "vital human needs" are satisfied.

PART III. PLANNED MEASURES

Article 11

Information concerning planned measures

> Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of an international watercourse.

Commentary

(1) Article 11 introduces the articles of Part III of the draft and provides a bridge between Part II, which includes article 9 on the regular exchange of data and information, and Part III, which deals with the provision of information concerning planned measures.

(2) Article 11 lays down a general obligation of watercourse States to provide each other with information concerning the possible effects upon the condition of the international watercourse of measures they might plan to undertake. The article also requires that watercourse States consult with each other on the effects of such measures.

(3) The expression "possible effects" includes all potential effects of planned measures, whether adverse or beneficial. Article 11 thus goes beyond article 12 and subsequent articles, which concern planned measures that may have a significant adverse effect upon other watercourse States. Indeed, watercourse States have an interest in being informed of possible positive as well as negative effects of planned measures. In addition, requiring the

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181/ The Delft Declaration is annexed to a UNDP press release, Geneva, 10 June 1991.

exchange of information and consultation with regard to all possible effects avoids problems inherent in unilateral assessments of the actual nature of such effects.

(4) The term "measures" is to be taken in its broad sense, i.e. as including new projects or programmes of a major or minor nature, as well as changes in existing uses of an international watercourse.

(5) Illustrations of instruments and decisions which lay down a requirement similar to that contained in article 11 are provided in the commentary to article 12.

Article 12

Notification concerning planned measures with possible adverse effects

> Before a watercourse State implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

Commentary

(1) Article 12 introduces a set of articles on planned measures that may have a significant adverse effect upon other watercourse States. These articles establish a procedural framework designed to assist watercourse States in maintaining an equitable balance between their respective uses of an international watercourse. It is envisaged that this set of procedures will thus help to avoid disputes relating to new uses of watercourses.

(2) The procedures provided for in articles 12 to 19 are triggered by the criterion that measures planned by a watercourse State may have "a significant adverse effect" upon other watercourse States. 182/ The threshold established by this standard is intended to be lower than that of "significant

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182/ The "Draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States", adopted Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States and approved by the Governing Council of UNEP in 1978 (decision 6/14 of 19 May 1978), define the expression "significantly affect" as referring to "any appreciable effects on a shared natural resource and [excluding] *de minimis* effects". For the text of the draft principles, see UNEP/IG.12/2, annexed to document UNEP/GC.6/17; for the final text, see UNEP, *Environmental Law. Guidelines and Principles*, No. 2, *Shared Natural Resources* (Nairobi, 1978).

harm" under article 7. Thus a "significant adverse effect" may not rise to the level of "significant harm" within the meaning of article 7. "Significant harm" is not an appropriate standard for the setting in motion of the procedures under articles 12 to 19, since use of that standard would mean that the procedures would be engaged only where implementation of the new measures might result in a conduct covered by article 7. Thus a watercourse State providing a notification of planned measures would be put in the position of admitting that the measures it was planning might cause significant harm to other watercourse States in conduct covered by article 7. The standard of a "significant adverse effect" is employed to avoid such a situation.

(3) The phrase "implements or permits the implementation of" is intended to make clear that article 12 covers not only measures planned by the State, but also those planned by private entities. The word "permit" is employed in its broad sense, i.e. as meaning both "allow" and "authorize". Thus, in the case of measures planned by a private entity, the watercourse State in question is under an obligation not to authorize the entity to implement the measures - and otherwise not to allow it to go forward with their implementation - before notifying other watercourse States as provided in article 12. References in subsequent articles to "implementation" of planned measures 183/ are to be understood as including permitting the implementation thereof.

(4) The term "timely" is intended to require notification sufficiently early in the planning stages to permit meaningful consultations and negotiations under subsequent articles, if such prove necessary. An example of a treaty containing a requirement of this kind is the Agreement of 30 April 1966 between Austria, the Federal Republic of Germany and Switzerland regulating the withdrawal of water from Lake Constance, 184/ article 7 of which provides that "riparian States shall, before authorizing [certain specified] withdrawals of water, afford one another in good time an opportunity to express their views".

(5) The reference to "available" technical data and information is intended to indicate that the notifying State is generally not required to conduct additional research at the request of a potentially affected State, but must

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183/ See article 15, para. 2, article 16, para. 1, and article 19, para. 1.

184/ Entered into force on 25 November 1967 (United Nations, Treaty Series, vol. 620, p. 191).

only provide such relevant data and information as has been developed in relation to the planned measures and is readily accessible. (The meaning of the term "available" is also discussed in paragraphs (5) to (7) of the commentary to article 9). If a notified State requests data or information that is not readily available, but is accessible only to the notifying State, it would generally be appropriate for the former to offer to indemnify the latter for expenses incurred in producing the requested material. As provided in article 31, the notifying State is not required to divulge data or information that is vital to its national defence or national security. Examples of instruments which employ the term "available" in reference to information to be provided are given in paragraph (7) of the commentary to article 9.

(6) The principle of notification of planned measures is embodied in a number of international agreements, decisions of international courts and tribunals, declarations and resolutions adopted by intergovernmental organizations, conferences and meetings, and studies by intergovernmental and international non-governmental organizations. 185/ An example of a treaty containing such a provision is the Convention of 25 May 1954 between Yugoslavia and Austria concerning water economy questions relating to the Drava (art. 4). 186/ Other similar agreements include the 1866 Treaty of Bayonne (Boundary Treaty between Spain and France) and its Additional Act 187/ (art. XI of the Act); the 1972 Convention relating to the status of the

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185/ A survey of these authorities is contained in the previous Special Rapporteur's third report, Yearbook ... 1987, vol. II (Part One), pp. 28 et seq., document A/CN.4/406 and Add.1 and 2, paras. 63-87, and p. 46, annex II.

186/ Entered into force on 15 January 1955 (United Nations, Treaty Series, vol. 227, p. 111).

187/ The relevant provisions of the Additional Act of 26 May 1866 to the Boundary Treaties of 2 December 1856, 14 April 1862 and 26 May 1866 (ratified on 12 July 1866) are reproduced in International Law Reports, 1957 (London), vol. 24 (1961), pp. 102-105 (see also p. 138), summarized in Yearbook ... 1974, vol. II (Part Two), pp. 170-171, document A/5409, paras. 895-902. This agreement was construed and applied in the Lake Lanoux arbitration.

Senegal River 188/ (art. 4), the 1960 Convention on the protection of Lake Constance against pollution 189/ (art. 1, para. 3), the 1960 Indus Waters Treaty between India and Pakistan 190/ (art. VII, para. 2) and the Convention of 9 December 1923 relating to the development of hydraulic power affecting more than one State 191/ (art. 4).

(7) A number of agreements provide for notification and exchange of information concerning new projects or uses through an institutional mechanism established to facilitate the management of a watercourse. An example is the 1975 Statute of the Uruguay River, 192/ adopted by Uruguay and Argentina, which contains detailed provisions on notification requirements, the content of the notification, the period for reply, and procedures applicable in the event that the parties fail to agree on the proposed project. 193/ Other agreements providing for notification of planned measures through a joint body include the treaty regime governing the Niger River 194/ and the Treaty of 19 November 1973 between Argentina and Uruguay on the River Plate and its maritime outlet. 195/ (art. 17).

188/ See Treaties Concerning the Utilization of International Watercourses for Other Purposes than Navigation, Natural Resources/Water Series No. 13.

189/ United Nations, Treaty Series, vol. 3, p. 313.

190/ Ibid., vol. 419, p. 125.

191/ Entered into force on 30 June 1925 (League of Nations, Treaty Series, vol. XXXVI, p. 75).

192/ See arts. 7 to 12 of the Statute in Actos Internacionales, Uruguay-Argentina, 1830-1980 (Montevideo, 1981) p. 593.

193/ See also chapter XV (art. 60) of the Statute, which provides for judicial settlement of disputes, and chapter XIV (arts. 58 and 59), which provides for a conciliation procedure.

194/ See article 4 of the Act of Niamey of 1963 (United Nations, Treaty Series, vol. 587, p. 9) and art. 12 of the 1964 Agreement concerning the Niger River Commission (ibid., vol. 589, p. 19).

195/ Entered into force on 12 February 1974 (see INTAL, Derecho de la Integración (Buenos Aires), vol. VII, No. 15 (March 1974), p. 225); International Legal Materials (Washington, D.C.), vol. XIII (1974), p. 251, summarized in Yearbook ... 1974, vol. II (Part Two), pp. 298 et seq., document A/CN.4/274, paras. 115-130.

(8) The subject of notification concerning planned measures was dealt with extensively by the arbitral tribunal in the Lake Lanoux case. 196/ Relevant conclusions reached by the tribunal in its award include the following: (a) at least in the factual context of the case, international law does not require prior agreement between the upper and lower riparian States concerning a proposed new use, and "international practice prefers to resort to less extreme solutions, limiting itself to requiring States to seek the terms of an agreement by preliminary negotiations without making the exercise of their competence conditional on the conclusion of this agreement"; 197/ (b) under then current trends in international practice concerning hydroelectric development, "consideration must be given to all interests, whatever their nature, which may be affected by the works undertaken, even if they do not amount to a right"; 198/ (c) "the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own"; 199/ (d) there is an "intimate connection between the obligation to take adverse interests into account in the course of negotiations and the obligation to give a reasonable place to such interests in the solution adopted". 200/ France had, in fact, consulted with Spain prior to the initiation of the diversion project at issue in that case, in response to Spain's claim that it was entitled to prior notification under article 11 of the 1866 Additional Act to the Treaty of Bayonne. 201/

196/ See United Nations, Reports of International Arbitral Awards, vol. XII, p. 281.

197/ Paragraph 11 (third subparagraph) of the award (Yearbook ... 1974, vol. II (Part Two), p. 197, document A/5409, para. 1065).

198/ Paragraph 22 (second subparagraph) of the award (ibid., p. 198, para. 1068).

199/ Paragraph 22 (third subparagraph) of the award (ibid.).

200/ Paragraph 24 (penultimate subparagraph) of the award (ibid.).

201/ See International Law Reports, 1957, vol. 24 (1961), pp. 102-105.

(9) The need for prior notification of planned measures has been recognized in a number of declarations and resolutions adopted by intergovernmental organizations, conferences and meetings. Recommendation 51 of the Action Plan for the Human Environment adopted by the United Nations Conference on the Human Environment in 1972 202/ contains the following principle relating to notification of planned new uses:

> "Nations agree that when major water resource activities are contemplated that may have a significant environmental effect on another country, the other country should be notified well in advance of the activity envisaged;".

(10) The Seventh International Conference of American States had previously adopted the Declaration of Montevideo, 203/ which provides not only for advance notice of planned works, but also for prior consent with regard to potentially injurious modifications. 204/ Examples of similar provisions are the "Principle of information and consultation" annexed to the "Principles concerning transfrontier pollution" adopted by the Council of OECD in 1974, 205/ and the recommendations on "regional cooperation" adopted by the United Nations Water Conference in 1977. 206/

202/ United Nations publication, Sales No. E.73.II.A.14 and corrigendum, part one, chap. II.B.

203/ See The International Conference of American States, First Supplement 1933-1940, (1940) p. 109.

204/ See paragraphs 6 to 8 of the Declaration. Paragraph 9 of the Declaration provides for the resolution of any remaining differences through diplomatic channels, conciliation, and ultimately any procedures under conventions in effect in America. It may be noted that Bolivia and Chile recognized that the Declaration embodied obligations applicable to the Lauca River dispute between them (see OAS Council, documents OEA/SER.G/VI, C/INF-47 (15 and 20 April 1962) and OEA/SER.G/VI, C/INF-50 (19 April 1962)).

205/ Recommendation C(74)224 adopted by the Council of OECD on 14 November 1974 (OECD, OECD and the Environment (Paris, 1986)), p. 142.

206/ Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977 (United Nations publication, Sales No. E.77.II.A.12), part one, chap. I., pp. 51-52, especially Recommendation 86 (g).

(11) Provisions on notification concerning planned measures may be found in a number of studies by intergovernmental and international non-governmental organizations. 207/

(12) Provisions on prior notification of planned measures are contained, for example, in the revised draft convention on the industrial and agricultural use of international rivers and lakes adopted by the Inter-American Juridical Committee in 1965 208/ (especially arts. 8 and 9); the revised draft propositions submitted to the Asian-African Legal Consultative Committee in 1973 by its sub-committee on the law of international rivers 209/ (especially proposition IV, para. 2, and proposition X); the resolution on "Utilization of non-maritime international waters (except for navigation)" adopted by the Institute of International Law in 1961 210/ (arts. 4-9); the resolution on the use of international rivers adopted by the Inter-American Bar Association at its Tenth Conference, in 1957 211/ (para. I.3); the Helsinki Rules adopted by ILA in 1966 212/ (art. XXIX); the articles on "Regulation of the flow of

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207/ The relevant provisions are reproduced in extenso in the previous Special Rapporteur's third report, Yearbook ... 1987, vol. II (Part One), pp. 32 et seq., document A/CN.4/406 and Add.1 and 2, paras. 81-87.

208/ Report of the Inter-American Juridical Committee on the work accomplished during its 1965 meeting (OEA/Ser.I/VI.1, CIJ-83) (Washington (D.C.), 1966), pp. 7-10; text reproduced in part in Yearbook ... 1974, vol. II (Part Two), pp. 349-351, document A/CN.4/274, para. 379.

209/ Asian-African Legal Consultative Committee, Report of the Fourteenth Session held in New Delhi (10-18 January 1973) (New Delhi), pp. 99 et seq.; text reproduced in Yearbook ... 1974, vol. II (Part Two), pp. 339-340, document A/CN.4/274, para. 367.

210/ See Annuaire de l'Institut de droit international, 1961, vol. 49-II, pp. 381-384.

211/ Inter-American Bar Association, Proceedings of the Tenth Conference, Buenos Aires, 1957 (Buenos Aires, 1958), pp. 82-83; reproduced in Yearbook ... 1974, vol. II (Part Two), p. 208, document A/5409, para. 1092.

212/ See Annuaire de l'Institut de droit international, 1961, vol. 49-II, pp. 381-384.

water of international watercourses" adopted by the ILA in 1980 213/ (arts. 7 and 8); the Rules on Water Pollution in an International Drainage Basin, adopted by the ILA in 1982 214/ (arts. 5 and 6); 215/ and the "Draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States", adopted by the Governing Council of UNEP in 1978 216/ (principles 6 and 7).

(13) The foregoing survey of authorities is illustrative only, but it reveals the importance that States and expert bodies attach to the principle of prior notification of planned measures. Procedures to be followed subsequent to a notification under article 12 are dealt with in articles 13 to 17.

Article 13

Period for reply to notification

Unless otherwise agreed:

(a) a watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate the findings to it;

(b) this period shall, at the request of a notified State for which the evaluation of the planned measure poses special difficulty, be extended for a period not exceeding six months.

213/ For the texts of the articles, with introduction and comments by the Rapporteur, E.J. Manner, see ILA, Report of the Fifty-ninth Conference, Belgrade, 1980 (London, 1982), pp. 362 et seq. The term "regulation" is defined in article 1 as:

> "continuing measures intended for controlling, moderating, increasing or otherwise modifying the flow of the waters in an international watercourse for any purpose; such measures may include storing, releasing and diverting of water by means such as dams, reservoirs, barrages and canals".

214/ ILA, Report of the Sixtieth Conference, Montreal, 1982 pp. 535 et seq. The Association has prepared other studies that are of present relevance. See, for example, the Rules of International Law Applicable to Transfrontier Pollution, also adopted at the Montreal Conference in 1982 (ibid., pp. 1-3) (art. 3, para. 1).

215/ See also art. 3.

216/ See UNEP, Environmental Law. Guidelines and Principles, No. 2, Shared Natural Resources (Nairobi 1978).

Commentary

(1) The provision of a notification under article 12 has two effects, which are dealt with in articles 13 and 14. The first effect, provided for in article 13, is that the period for reply to the notification begins to run. The second effect, dealt with in article 14, is that the obligations specified in that article arise for the notifying State.

(2) A full understanding of the effect of article 13 requires that brief reference be made to the provisions of several subsequent articles. Subparagraph (a) affords the notified State or States a period of six months for study and evaluation of the possible effects of the planned measures. Subparagraph (b) recognizes that in exceptional cases, a notified State may need additional time to reply. A notified State seeking such an extension must cite the "special difficulty" which requires the extension. During the period for reply to notification, article 14 requires that the notifying State, *inter alia*, not proceed with the implementation of its plans without the consent of the notified State. In any event, paragraph 1 of article 15 requires the notified State to reply as early as possible, out of good-faith consideration for the interest of the notifying State in proceeding with its plans. Of course, the notified State may reply after the period applicable has elapsed, but such a reply could not operate to prevent the notifying State from proceeding with the implementation of its plans, in view of the provisions of article 16. The latter article allows the notifying State to proceed to implementation if it receives no reply within the six-month period.

(3) The Commission considered the possibility of using a general standard for the determination of the period for reply, such as "a reasonable period of time", 217/ rather than a fixed period such as six months. 218/ It concluded, however, that a fixed period, while necessarily somewhat arbitrary, would ultimately be in the interests of both the notifying and the notified States. While a general standard would be more flexible and adaptable to

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217/ Instruments using this kind of standard include the 1961 resolution of the Institute of International Law on "Utilization of non-maritime international waters (except for navigation)" (*Annuaire de l'Institut de droit international, 1961*, vol. 49-II, pp. 381-384), art. 6, and the Helsinki Rules (ILA, *Report of the Fifty-second Conference, Helsinki, 1966*, pp. 484 et seq.), art. XXIX, para. 3.

218/ An instrument stipulating a six-month period is the 1975 Statute of the Uruguay River (*Actos Internacionales, Uruguay-Argentina*, 1830-1980 (1981) p. 593), art. 8.

different situations, its inherent uncertainty could at the same time lead to disputes between the States concerned. All these considerations demonstrate the need for watercourse States to agree upon a period of time that is appropriate to the case concerned, in the light of all relevant facts and circumstances. Indeed, the opening clause of article 13, "unless otherwise agreed", is intended to emphasize that, in each case, States are expected and encouraged to agree upon an appropriate period. The six-month period for reply as well as the six-month extension of the period of reply provided for in article 13 are thus residual, and apply only in the absence of agreement between the States concerned upon another period.

Article 14

Obligations of the notifying State during the period for reply

> During the period referred to in article 13, the notifying State shall cooperate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not implement or permit the implementation of the planned measures without the consent of the notified States.

Commentary

(1) As its title indicates, article 14 deals with the obligations of the notifying State during the period specified in article 13 for reply to a notification made pursuant to article 12. There are two obligations. The first is an obligation of cooperation, which takes the specific form of a duty to provide the notified State or States, at their request, "with any additional data and information that is available and necessary for an accurate evaluation" of the possible effects of the planned measures. Such data and information would be "additional" to that which had already been provided under article 12. The meaning of the term "available" is discussed in paragraph (5) of the commentary to article 12.

(2) The second obligation of the notifying State under article 14 is not to "implement or permit the implementation of the planned measures without the consent of the notified States". The expression "implement or permit the implementation of" is discussed in paragraph (3) of the commentary to article 12, and bears the same meaning as in that article. It perhaps goes without saying that this second obligation is a necessary element of the procedures provided for in Part III of the draft, since these procedures are designed to maintain a state of affairs characterized by the expression

"equitable utilization" within the meaning of article 5. If the notifying State were to proceed with implementation before the notified State had had an opportunity to evaluate the possible effects of the planned measures and inform the notifying State of its findings, the notifying State would not have at its disposal all the information it would need to be in a position to comply with articles 5 to 7. The duty not to proceed with implementation is thus intended to assist watercourse States in ensuring that any measures they plan will not be inconsistent with their obligations under articles 5 and 7.

Article 15

Reply to notification

> 1. The notified States shall communicate their findings to the notifying State as early as possible.
>
> 2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 5 or 7, it shall communicate this finding to the notifying State within the period applicable pursuant to article 13, together with a documented explanation setting forth the reasons for the finding.

Commentary

(1) Article 15 deals with the obligations of the notified State or States with regard to their response to the notification provided under article 12. As with article 14, there are two obligations. The first, laid down in paragraph 1, is to communicate their findings concerning possible effects of the planned measures to the notifying State "as early as possible". As explained in paragraph (2) of the commentary to article 13, this communication must be made within the six-month period provided for in article 13, or in the case where a notified State has requested an extension of time, due to special circumstances, within the period of such extension, i.e. six months, in order for a notified State to have the right to request a further suspension of implementation under paragraph 3 of article 17. If a notified State completed its evaluation in less than six months, or in less than the additional six months where an extension was requested, however, paragraph 1 of article 15 would call for it to inform the notifying State immediately of its findings. A finding that the planned measures would be consistent with articles 5 and 7 would conclude the procedures under part III of the draft, and the notifying State could proceed without delay to implement its plans. Even if a contrary

finding were made, however, early communication of that finding to the notifying State would result in bringing to a speedier conclusion the applicable procedures under article 17.

(2) Paragraph 2 deals with the second obligation of the notified States. This obligation arises, however, only for a notified State which "finds that implementation of the planned measures would be inconsistent with the provisions of articles 5 or 7". In other words, the obligation is triggered by a finding that implementation of the plans would result in a breach of the obligations under article 5, or article 7. (As noted in paragraph (3) of the commentary to article 12, the term "implementation" applies to measures planned by private parties as well as to those planned by the State itself.) Paragraph 2 of article 15 requires a notified State which has made such a finding to provide the notifying State, within the period specified in article 13, with an explanation of the finding. The explanation must be "documented" - i.e. must be supported by an indication of the factual or other bases for the finding - and must set forth the reasons for the notified State's conclusion that implementation of the planned measures would violate articles 5 or 7. 219/ The word "would" was used rather than a term such as "might" in order to indicate that the notified State must conclude that a violation of articles 5 or 7 is more than a mere possibility. The reason for the strictness of these requirements is that a communication of the kind described in paragraph 2 permits a notified State to request, pursuant to paragraph 3 of article 17, further suspension of the implementation of the planned measures in question. This effect of the communication justifies the requirement of paragraph 2 that the notified State demonstrate its good faith by showing that it has made a serious and considered assessment of the effects of the planned measures.

219/ A similar requirement is contained in article 11 of the 1975 Statute of the Uruguay River Actos Internacionales, Uruguay-Argentina, 1830-1980 (Montevideo, 1981), p. 593, which provides that the communication of the notified party "shall state which aspects of the works or of the mode of operation may cause appreciable harm to ... the regime of the river or the quality of its waters, the technical grounds for that conclusion and suggested changes in the project or the mode of operation".

Article 16

Absence of reply to notification

1. If, within the period applicable pursuant to article 13, the notifying State receives no communication under paragraph 2 of article 15, it may, subject to its obligations under articles 5 and 7, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

2. Any claim to compensation by a notified State which has failed to reply may be offset by the costs incurred by the notifying State for action undertaken after the expiration of the time for a reply which would not have been undertaken if the notified State had objected within the period applicable pursuant to article 13.

Commentary

(1) Article 16 deals with cases in which the notifying State, during the required period applicable in article 13, receives no communication under paragraph 2 of article 15 - i.e. one which states that the planned measures would be inconsistent with the provisions of articles 5 or 7, and provides an explanation for such finding. In such a case, the notifying State may implement or permit the implementation of the planned measures, subject to two conditions. The first is that the plans be implemented "in accordance with the notification and any other data and information provided to the notified States" under articles 12 and 14. The reason for this condition is that the silence of a notified State with regard to the planned measures can be regarded as tacit consent only in relation to matters which were brought to its attention. The second condition is that implementation of the planned measures be consistent with the obligations of the notifying State under articles 5 and 7.

(2) The idea underlying article 16 is that, if a notified State does not provide a response under paragraph 2 of article 15 within the required period, it is *inter alia* precluded from claiming the benefits of the protective regime established in part III of the draft. The notifying State may then proceed with the implementation of its plans, subject to the conditions referred to in paragraph (1) of the present commentary. Permitting the notifying State to proceed in such cases is an important aspect of the balance which the present articles seek to strike between the interests of notifying and notified States.

(3) The purpose of paragraph 2 is to avoid the consequences of a failure to reply on the part of a notified State from falling entirely on the notifying State. The effect of the paragraph is to establish that the costs incurred by the notifying State in proceeding with its plans in reliance on the absence of a reply from the notified State can be used as a set off against any claims by a notified State. It was decided that to authorize expressly counter claims by a notifying State (i.e. claims in excess of those put forward by the notified State) could prove excessively onerous in some cases. In the highly unlikely event there are several notified States who failed to reply but who assert injury, the set off shall be allocated among them pro rata on the basis on the ratio of their respective claims to each other.

Article 17

Consultations and negotiations concerning planned measures

> 1. If a communication is made under paragraph 2 of article 15, the notifying State and the State making the communication shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation.
>
> 2. The consultations and negotiations shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.
>
> 3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

Commentary

(1) Article 17 deals with cases in which there has been a communication under paragraph 2 of article 15, i.e. one containing a finding by the notified State that "implementation of the planned measures would be inconsistent with the provisions of articles 5 or 7".

(2) Paragraph 1 of article 17 calls for the notifying State to enter into consultations and, if necessary, negotiations with the State making a communication under paragraph 2 of article 15 "with a view to arriving at an equitable resolution of the situation". Some members saw a distinction between consultations and negotiations. The term "if necessary" was therefore used to underscore the fact that consultations, if undertaken, could sometimes

resolve the issues and therefore would not always have to be followed by negotiations. The "situation" referred to is that produced by the good-faith finding of the notified State that implementation of the planned measures would be inconsistent with the obligations of the notifying State under articles 5 and 7. The "equitable resolution" referred to in paragraph 1 could include, for example, modification of the plans so as to eliminate their potentially harmful aspects, adjustment of other uses being made by either of the States, or the provision by the notifying State of monetary or another form of compensation acceptable to the notified State. Consultations and negotiations have been required in similar circumstances in a number of international agreements 220/ and decisions of international courts and tribunals. 221/ The need for such consultations and negotiations has

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220/ See, for example, the 1954 Convention between Yugoslavia and Austria concerning water economy questions relating to the Drava (United Nations, Treaty Series, vol. 227, p. 111), art. 4; the 1960 Convention on the protection of Lake Constance against pollution (Legislative Texts, p. 438, Treaty No. 127), art. 1, para. 3; the 1964 Agreement between Poland and the USSR concerning the use of water resources in frontier waters (United Nations, Treaty Series, vol. 552, p. 175), art. 6; the 1964 Agreement concerning the Niger River Commission and the navigation and transport on the River Niger (ibid., vol. 587, p. 19), art. 12; and the 1981 Convention between Hungary and the USSR concerning water economy questions in frontier waters (referred to in Environmental Protection and Sustainable Development. Legal Principles and Recommendations (Dordrecht, Martinus Nijhoff, 1987), p. 106), arts. 3-5.

221/ See especially the Lake Lanoux arbitral award. Of general relevance in this regard are several decisions of the ICJ in cases involving the law of the sea, such as the North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark, and Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969, I.C.J. Reports 1969, p. 3, especially pp. 46-48, paras. 85 and 87; and the Fisheries Jurisdiction case) (United Kingdom v. Iceland), Merits, Judgment of 25 July 1974, I.C.J. Reports 1974, p. 3, especially pp. 30-31, para. 71, and p. 33, para. 78.

also been recognized in a variety of resolutions and studies by intergovernmental 222/ and international non-governmental organizations. 223/

(3) Paragraph 2 concerns the manner in which the consultations and negotiations provided for in paragraph 1 are to be conducted. The language employed is inspired chiefly by the judgment of the International Court of Justice in the Fisheries Jurisdiction (United Kingdom v. Iceland) case 224/ and by the award of the arbitral tribunal in the Lake Lanoux case. 225/ The manner in which consultations and negotiations are to be conducted was also addressed by the International Court of Justice in the North Sea Continental Shelf cases. 226/ The expression "legitimate" interests is employed in article 3 of the Charter of Economic Rights and

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222/ See, for example, the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX) of 12 December 1974), art. 3; General Assembly resolution 3129 (XXVIII) of 13 December 1973 on cooperation in the field of the environment concerning natural resources shared by two or more States; the "Principle of information and consultation" annexed to the 1974 OECD "Principles concerning transfrontier pollution" (Recommendation c (74) 224 adopted by the Council of OECD on 14 November 1974) OECD, OECD and the Environment (Paris, 1966), p. 142; and UNEP's 1978 "Draft principles of conduct" concerning shared natural resources (UNEP, Environmental Law: Guidelines and Principles: No. 2, Shared Natural Resources (Nairobi, 1978) (principles 5, 6 and 7)).

223/ See, for example, the above-mentioned resolutions adopted by the Institute of International Law in 1961 (Annuaire de l'Institut de droit international, 1961, vol. 49-II, pp. 381-384, art. 6) and in 1979 (Annuaire de l'Institut de droit international, 1979, vol. 58-II, pp. 196 et seq., art. VII); and the articles adopted by the ILA in 1980 (ILA, Report of the Fifty-second Conference, Helsinki, 1966, pp. 484 et seq., art. 8) and in 1982 (ILA, Report of the Sixtieth Conference, Montreal 1982, pp. 535 et seq., art. 6)

224/ See especially paragraph 78 of the judgment (in fine) (United Nations, Reports of International Arbitral Awards, vol. II, pp. 921 et seq., and Yearbook ... 1974, vol. II (Part Two) p. 197).

225/ See United Nations, Reports of International Arbitral Awards, vol. XII, p. 281, and the passages from the award quoted in Yearbook ... 1974, vol. II (Part Two).

226/ See paragraphs 85 and 87 of the judgment.

Duties of States 227/ and is used in paragraph 2 of the present article in order to provide some limitation of the scope of the term "interests".

(4) Paragraph 3 requires the notifying State to suspend implementation of the planned measures for a further period of six months, but only if requested to do so by the notified State when the latter makes a communication under paragraph 2 of article 15. Implementation of the measures during a reasonable period of consultations and negotiations would not be consistent with the requirements of good faith laid down in paragraph 2 of article 17 and referred to in the Lake Lanoux arbitral award. 228/ By the same token, however, consultations and negotiations should not further suspend implementation for more than a reasonable period of time. This period should be the subject of agreement by the States concerned, who are in the best position to decide upon a length of time that is appropriate under the circumstances. In the event that they are not able to reach agreement, however, paragraph 3 sets a period of six months. After this period has expired, the notifying State may proceed with implementation of its plans, subject always to its obligations under articles 5 and 7.

Article 18

Procedures in the absence of notification

> 1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have a significant adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a documented explanation setting forth its reasons.
>
> 2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

227/ General Assembly resolution 3281 (XXIX) of 12 December 1974.

228/ See passages from the award quoted in United Nations, Reports of International Arbitral Awards, vol. II, pp. 921 et seq. and in Yearbook ... 1974, vol. II (Part Two), p. 197.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

Commentary

(1) Article 18 addresses the situation in which a watercourse State is aware that measures are being planned by another State (or by private parties in that State) and believes that they may have a significant adverse effect upon it, but has received no notification thereof. In such a case, article 18 allows the first State to seek the benefits of the protective regime provided for under articles 12 et seq.

(2) Paragraph 1 allows "a watercourse State" in the position described above to request the State planning the measures in question "to apply the provisions of article 12". The expression "a watercourse State" is not intended to exclude the possibility that more than one State may believe measures are being planned by another State. The words "apply the provisions of article 12" should not be taken as suggesting that the State planning the measures has necessarily failed to comply with its obligations under article 12. In other words, that State may have made an assessment of the potential of the planned measures for causing significant adverse effects upon other watercourse States and concluded in good faith that no such effects would result therefrom. Paragraph 1 allows a watercourse State to request that the State planning measures take a "second look" at its assessment and conclusion, and does not prejudge the question whether the planning State initially complied with its obligations under article 12. In order for the first State to be entitled to make such a request, however, two conditions must be satisfied. The first is that the requesting State must have "serious reason to believe" that measures are being planned which may have a significant adverse effect upon it. The second is that the requesting State must provide a "documented explanation setting forth its reasons". These conditions are intended to require that the requesting State have more than a vague and unsubstantiated apprehension. A serious and substantiated belief is necessary, particularly in view of the possibility that the planning State may be required to suspend implementation of its plans under paragraph 3 of article 18.

(3) The first sentence of paragraph 2 deals with the case in which the planning State concludes, after taking a "second look" as described in

paragraph (2) of the present commentary, that it is not under an obligation to provide a notification under article 12. In such a situation, paragraph 2 seeks to maintain a fair balance between the interests of the States concerned by requiring the planning State to provide the same kind of justification for its finding as was required of the requesting State under paragraph 1. The second sentence of paragraph 2 deals with the case in which the finding of the planning State does not satisfy the requesting State. It requires that, in such a situation, the planning State promptly enter into consultations and negotiations with the other State (or States), at the request of the latter. The consultations and negotiations are to be conducted in the manner indicated in paragraphs 1 and 2 of article 17. In other words, their purpose is to achieve "an equitable resolution of the situation", and they are to be conducted "on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State". These phrases are discussed in the commentary to article 17.

(4) Paragraph 3 requires the planning State to refrain from implementing the planned measures for a period of six months, in order to allow consultations and negotiations to be held, if it is requested to do so by the other State at the time the latter requests consultations and negotiations under paragraph 2. This provision is similar to that contained in paragraph 3 of article 17, but in the case of article 18 the period starts to run from the time of the request for consultations under paragraph 2.

Article 19

Urgent implementation of planned measures

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to articles 5 and 7, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in article 12 together with the relevant data and information.

3. The State planning the measures shall, at the request of any of the States referred to in paragraph 2, promptly enter into consultations and negotiations with it in the manner indicated in paragraphs 1 and 2 of article 17.

Commentary

(1) Article 19 deals with planned measures whose implementation is of the utmost urgency "in order to protect public health, public safety or other equally important interests". It does not deal with emergency situations, which will be addressed in article 28. Article 19 concerns highly exceptional cases in which interests of overriding importance require that planned measures be implemented immediately, without awaiting the expiry of the periods allowed for reply to notification and for consultations and negotiations. Provisions of this kind have been included in a number of international agreements. 229/ In formulating the article, the Commission has endeavoured to guard against possibilities of abuse of the exception it establishes.

(2) Paragraph 1 refers to the kinds of interests that must be involved in order for a State to be entitled to proceed to implementation under article 19. The interests in question are those of the highest order of importance, such as protecting the population from the danger of flooding or issues of vital national security. Paragraph 1 also contains a waiver of the waiting periods provided for under article 14 and paragraph 3 of article 17. The right of the State to proceed to implementation is, however, subject to its obligations under paragraphs 2 and 3 of article 19.

(3) Paragraph 2 requires a State proceeding to immediate implementation under article 19 to provide the "other watercourse States referred to in article 12" with a formal declaration of the urgency of the measures, together with the relevant data and information. These requirements are intended to provide for a demonstration of the good faith of the State proceeding to implementation, and to ensure that the other States are informed as fully as possible of the possible effects of the measures. The "other watercourse States" are those upon which the measures "may have a significant adverse effect" (art. 12).

(4) Paragraph 3 requires that the State proceeding to immediate implementation enter promptly into consultations and negotiations with the other States, if and when requested to do so by those States. The requirement

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229/ See, for example, the Agreement of 10 April 1922 between Denmark and Germany for the settlement of questions relating to watercourses and dikes on the German-Danish frontier (League of Nations, Treaty Series, vol. X, p. 201) (art. 29 *in fine*); and the 1960 Convention on the protection of Lake Constance against pollution (Recueil officiel des lois et des ordonnances 1961, vol. 2, p. 923, No. 43, Legislative Texts, Treaty No. 127, p. 438, art. 1, para. 3).

that the consultations and negotiations be conducted in the manner indicated in paragraphs 1 and 2 of article 17 is the same as that contained in paragraph 2 of article 18, and is discussed in the commentary to that provision.

PART IV. PROTECTION, PRESERVATION AND MANAGEMENT

Article 20

Protection and preservation of ecosystems

Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourses.

Commentary

(1) Article 20 introduces Part IV of the draft articles by laying down a general obligation to protect and preserve the ecosystems of international watercourses. In view of the general nature of the obligation contained in this article, the Commission was of the view that it should precede the other more specific articles in Part IV.

(2) Like article 192 of the 1982 United Nations Convention on the Law of the Sea, 230/ article 20 contains obligations of both protection and preservation. These obligations relate to the "ecosystems of international watercourses", an expression utilized by the Commission because it is more precise than the concept of the "environment" of a watercourse. The latter term could be interpreted quite broadly, to apply to areas "surrounding" the watercourses that have minimal bearing on the protection and preservation of the watercourse itself. Furthermore, the term "environment" of a watercourse might be construed to refer only to areas outside the watercourse, which is of course not the intention of the Commission. For these reasons, the Commission preferred to utilize the term "ecosystem" which is believed to have a more precise scientific and legal meaning. 231/ Generally, that term refers to an ecological unit consisting of living and non-living components that are

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230/ Article 192, entitled "General obligation", provides: "States have the obligation to protect and preserve the marine environment."

231/ Reference may be made generally in this connection to the ongoing work of the Economic Commission for Europe in this field: see "Ecosystems approach to water management" (ENVWA/WP.3/R.7/Rev.1), and the case studies on the Oulujoki River (Finland), Lake Mjosa (Norway), the Lower Rhine River (Netherlands), and the Ivankovskoye Reservoir (Russian Federation) (ENVWA/WP.3/R.11/Add.1 and 2).

interdependent and function as a community. 232/ "In ecosystems, everything depends on everything else and nothing is really wasted." 233/ Thus, "[a]n external impact affecting one component of an ecosystem causes reactions among other components and may disturb the equilibrium of the entire ecosystem". 234/ Since "[e]cosystems support life on earth", 235/ such an "external impact", or interference, may impair or destroy the ability of an ecosystem to function as a life-support system. It goes without saying that serious interferences can be, and often are, brought about by human conduct. Human interferences may irreversibly disturb the equilibrium of freshwater ecosystems, in particular, rendering them incapable of supporting human and other forms of life. As observed in the Proposed Medium-Term Plan of the United Nations for the period 1992-1997:

> "Interactions between freshwater ecosystems on the one hand and human activities on the other are becoming more complex and incompatible as socio-economic development proceeds. Water basin development activities can have negative impacts too, leading to unsustainable development, particularly where these water resources are shared by two or more States." 236/

The obligation to protect and preserve the ecosystems of international watercourses addresses this problem, which is already acute in some parts of

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232/ "An ecosystem is commonly defined as a spatial unit of Nature in which living organisms and the non-living environment interact adaptively." (ENVWA/WP.3/R.7/Rev.1, p. 3, para. 9). The Expert Group on Environmental Law of the World Commission on Environment and Development, in the comment to article 3 of its Legal principles and recommendations, defines "ecosystems" as "systems of plants, animals and micro-organisms together with the non-living components of their environment" (Environmental Protection and Sustainable Development, Legal Principles and Recommendations (1987), p. 45).

233/ "Ecosystems approach to water management" (ENVWA/WP.3/R.7/Rev.1), p. 3, para. 9.

234/ Ibid., para. 11.

235/ Ibid., para. 9.

236/ Proposed Medium-Term Plan for the period 1992-1997, Major programme IV, International economic cooperation for development, Programme 16, Environment (A/45/6), p. 9, para. 16.24.

the world and which will become so in others as increasing human populations place ever greater demands on finite water resources. 237/

(3) The obligation to "protect" the ecosystems of international watercourses is a specific application of the requirement contained in article 5 that watercourse States are to use and develop an international watercourse in a manner that is consistent with adequate protection thereof. In essence, it requires that watercourse States shield the ecosystems of international watercourses from harm or damage. It thus includes the duty to protect those ecosystems from a significant threat of harm. 238/ The obligation to "preserve" the ecosystems of international watercourses, while similar to that of protection, applies in particular to freshwater ecosystems that are in a pristine or unspoiled condition. It requires that these ecosystems be protected in such a way as to maintain them as much as possible in their natural state. Together, protection and preservation of aquatic ecosystems help to ensure their continued viability as life support systems, thus providing an essential basis for sustainable development. 239/

(4) In requiring that watercourse States act "individually or jointly", article 20 recognizes that in some cases it will be necessary and appropriate that watercourse States cooperate, on an equitable basis, to protect and preserve the ecosystems of international watercourses. The requirement of article 20 that watercourse States act "individually or jointly" is therefore to be understood as meaning that joint, cooperative action is to be taken where appropriate, and that such action is to be taken on an equitable basis. For example, joint action would usually be appropriate in the case of contiguous watercourses or those being managed and developed as a unit. What constitutes action on an equitable basis will, of course, vary with the

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237/ See, e.g. "Water: the finite resource", IUCN Bulletin, vol. 21, No. 1, March 1990, p. 14.

238/ The obligation to protect the ecosystems of international watercourses is thus a general application of the principle of precautionary action, discussed in International Legal Materials, vol. XXVI (1987) p. 1516.

239/ The following observation contained in the Proposed Medium-Term Plan is relevant in this connection: "The maintenance of biological diversity, which encompasses all species of plants, animals and micro-organisms and the ecosystems of which they are part, is a major element in achieving sustainable development." (A/45/6), para. 16.7.

circumstances. 240/ Among the factors to be taken into account in this connection are the extent to which the watercourse States concerned have contributed to the problem and the extent to which they will benefit from its solution. Of course, the duty to participate equitably in the protection and preservation of the ecosystems of an international watercourse is not to be regarded as implying an obligation to repair or tolerate harm that has resulted from another watercourse State's breach of its obligations under the draft articles. 241/ But the general obligation of equitable participation demands that the contributions of watercourse States to joint protection and preservation efforts be at least proportional to the measure in which they have contributed to the threat or harm to the ecosystems in question. Finally, it will be recalled that article 194 of the 1982 United Nations Convention on the Law of the Sea also requires that measures be taken "individually or jointly", in that case with regard to pollution of the marine environment. 242/

(5) There is ample precedent for the obligation contained in article 20 in the practice of States and the work of international organizations. Illustrations of these authorities are provided in the following paragraphs. 243/

240/ See generally the commentaries to articles 5 and 6 above. For example, paragraph (1) of the commentary to article 6, referring to the obligation of equitable and reasonable utilization laid down in article 5, states as follows:

> "The latter rule is necessarily general and flexible, and requires for its proper application that States take into account concrete factors pertaining to the international watercourse in question, as well as to the needs and uses of the watercourse States concerned. What is equitable and reasonable utilization in a specific case will therefore depend on a weighing of all relevant factors and circumstances."

241/ Thus, for example, State A would be under no obligation to repair appreciable harm it had suffered solely as a result of the conduct of State B.

242/ United Nations Convention on the Law of the Sea, article 194, para. 1.

243/ For more extensive surveys of relevant authorities, see the fourth report of the previous Special Rapporteur Yearbook ... 1988, vol. II (Part One) pp. 205 et seq. document A/CN.4/412 and Add.1 and 2, paras. 28-86; and the third report of the second Special Rapporteur, Yearbook ... 1982, vol. II (Part One), pp. 65 et seq. document A/CN.4/348, paras. 243-336.

(6) Provisions concerning the protection of the ecosystems of international watercourses may be found in a number of agreements. For example, in the 1975 Statute of the Uruguay River, Argentina and Uruguay agree to coordinate, through a commission established under the agreement, "appropriate measures to prevent the alteration of the ecological balance, and to control impurities and other harmful elements in the river and its catchment area". 244/ The parties further undertake to "agree on measures to regulate fishing activities in the river with a view to the conservation and preservation of living resources", 245/ and "to protect and preserve the aquatic environment ...". 246/ Similarly, reference can be made to the 1978 Convention relating to the status of the River Gambia; 247/ to the 1963 Act regarding navigation and economic cooperation between the States of the Niger Basin; 248/ and to the 1978 Agreement between Canada and the United States on Great Lakes Water Quality. 249/

244/ Statute of the Uruguay River, art. 36 in *Actos Internacionales Uruguay-Argentina, 1830-1980* (Montevideo, 1981), p. 593.

245/ Ibid., art. 37.

246/ Ibid., art. 41.

247/ Convention relating to the status of the River Gambia, 30 June 1978 (Gambia, Guinea, Senegal), reproduced in *Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation*, Natural Resources/Water Series No. 13 (1984), Treaty No. 10, p. 39, art. 4, p. 40.

248/ Act regarding navigation and economic cooperation between the States of the Niger Basin (Cameroon, Chad, Dahomey, Guinea, Ivory Coast (Côte d'Ivoire), Mali, Niger, Nigeria, Upper Volta (Burkina Faso)), 26 October 1963, art. 4, (United Nations, *Treaty Series*, vol. 587, p. 9), also reproduced in *Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation*, Natural Resources/Water Series No. 13, p. 6, at p. 7.

249/ Article II (United States Government Printing Office, *Treaties and Other International Acts Series*, No. 9257).

(7) A number of early agreements had as their object the protection of fish and fisheries. 250/ An example includes the 1904 Convention between France and Switzerland for the regulation of fishing in their frontier waters. 251/ Other agreements in effect protect the ecosystems of international watercourses by protecting the waters thereof against pollution. These include the 1958 Treaty between the Soviet Union and Afghanistan concerning the regime of the Soviet-Afghan State frontier; 252/ and the 1956 Convention concerning the canalization of the Moselle between the Federal Republic of Germany, France and Luxembourg. 253/

(8) The need to protect and preserve the ecosystems of international watercourses is also recognized in the work of international organizations, conferences and meetings. The Act of Asunción, adopted by the Fourth Meeting of Foreign Ministers of the Plata River Basin States in 1971, 254/ refers to the "grave health problems arising from ecological relationships in the geographic area of the River Plate Basin, which have an unfavourable impact on the social and economic development of the region", and notes that "this health syndrome is related to the quality and quantity of the water resources". 255/ The Act also mentions "The need to control water pollution and preserve as far as possible the natural qualities of the water as an

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250/ 1868 Final Act on the delimitation of the international frontier of the Pyrenees between France and Spain, sect. I, clause 6, (Legislative Texts, Treaty No. 186, pp. 674 and 676, summarized in Yearbook ... 1974, vol. II (Part Two), p. 182, document A/5409, paras. 979 and 980 (c)). See also e.g. the 1887 Convention between Switzerland and the Grand Duchy of Baden and Alsace-Lorraine, (Legislative Texts, Treaty No. 113, p. 397, art. 10); the 1906 Agreement between Switzerland and Italy establishing provisions in respect of fishing in frontier waters, (Legislative Texts, Treaty No. 230, p. 839, art. 12, para. 5, summarized in Yearbook ... 1974, vol. II (Part Two), document A/CN.4/274, para. 633); and the 1904 Convention between France and Switzerland for the regulation of fishing in their frontier waters, (Legislative Texts, Treaty No. 196, p. 701, arts. 6, 11 and 17).

251/ Legislative Texts, Treaty No. 196, p. 701, art. 17 at p. 706.

252/ Ibid., Treaty No. 86, p. 276, art. 13.

253/ Ibid., Treaty No. 123, p. 424, art. 55.

254/ Reproduced in Yearbook ... 1974, vol. II (Part Two), document A/CN.4/274, para. 326.

255/ Ibid., Resolution No. 15.

integral part of a policy in the conservation and utilization of the water resources of the Basin ...". 256/ Among the decisions adopted by the United Nations Water Conference, held at Mar del Plata in 1977, is a recommendation entitled "Environment and health", which provides that "It is necessary to evaluate the consequences which the various uses of water have on the environment, to support the measures aimed at controlling water-related diseases, and to protect ecosystems." 257/

(9) In addition to the instruments concerning the protection and preservation of the ecosystems of international watercourses, a number of agreements, resolutions, declarations and other instruments recognize the importance of protecting and preserving the environment in general, or ecosystems other than those of watercourses, in particular. Agreements concerning the environment in general include the 1968 African Convention on the Conservation of Nature and Natural Resources 258/ and the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources. 259/ Reference has already

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256/ Ibid., p. 323.

257/ Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977 (United Nations publication, Sales No. E.77.II.A.12), p. 25.

258/ Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation, Natural Resources/Water Series No. 13, p. 2. See especially article II, "Fundamental principle", in which the parties "undertake to adopt the measures necessary to ensure conservation, sustainable utilization and development of soil, water, air, floral and faunal resources" taking into account the necessity of maintaining essential ecological processes ...", and article V, "Water and air", in which the parties agree to "establish and implement policies designed to maintain air- and water-based essential ecological processes ...".

259/ Adopted on 7 September 1985 by Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand. See especially article 1, "Fundamental principle", in which the parties undertake to adopt "the measures necessary to maintain essential ecological processes and life-support systems ...", and article 8, "Water", in which the parties recognize "the role of water in the functioning of natural ecosystems..." and agree to endeavour to assure sufficient water supply "for, *inter alia*, the maintenance of natural life supporting systems and aquatic fauna and flora ...".

See also, e.g. the 1940 Washington Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere (United Nations, Treaty Series, vol. 161, p. 193); the 1972 Paris Convention concerning the Protection of World Cultural and Natural Heritage (International Legal Materials, vol. XI (1972), p. 1358); the 1979 Berne Convention on the Conservation of European Wildlife and Natural Habitats, (European Treaty Series, No. 104); and the 1986 been made to the analogous obligation "to protect and preserve the marine environment" contained in article 192 of the 1982 United Nations Convention of the Law of the Sea, which is complemented by a number of more specific agreements concerning the protection of the marine environment. 260/ In addition, the principle of precautionary action reflected in article 20 has found expression in a number of international agreements and other instruments. 261/ Also of general relevance, as evidence of a recognition by States of the necessity of protecting essential ecological processes, are the numerous declarations and resolutions concerning the preservation of the environment. These include the 1972 Stockholm Declaration of the

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Convention for the Protection and Development of the Natural Resources and Environment of the South Pacific Region (International Legal Materials, vol. XXVI (1987), p. 41).

260/ See, e.g. the 1981 Convention for cooperation in the protection and development of the marine and coastal environment of the West and Central African Region (Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation, Natural Resources/Water Series No. 13, p. 2); the 1974 Convention on the prevention of pollution from land-based sources, (International Legal Materials, vol. XIII (1974), p. 352); the 1974 Convention on the protection of the marine environment of the Baltic Sea area (ibid., p. 546); the 1976 Convention on the protection of the Mediterranean Sea against pollution (ibid., vol. XV (1976) p. 290), and its 1980 Protocol (ibid., vol. XX (1980), p. 873); and the 1978 Kuwait Regional Convention for cooperation in the protection of the marine environment from pollution (ibid., vol. XVII (1978), p. 511).

261/ The principle of precautionary action has been applied especially in instruments concerning the ozone layer and land-based marine pollution. With regard to the ozone layer, see the 1985 Vienna Convention for the Protection of the Ozone Layer, (International Legal Materials, vol. XXVI (1987), p. 1516), and its 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (ibid., p. 1541). Concerning land-based and other forms of marine pollution, see, e.g. Decision 15/27 adopted by the Governing Council of the United Nations Environment Programme at its fifteenth session on 25 May 1989 under the title "Precautionary approach to marine pollution, including waste-dumping at sea"; and the Ministerial Declarations of the Second and Third International Conferences on the Protection of the North Sea (London, 24-25 November 1987 and The Hague, 8 March 1990, respectively). The Ministerial Declarations specify that the precautionary principle entails the taking of action to avoid potentially damaging impacts of dangerous substances (i.e., those that are persistent, toxic or bioaccumulative) "even before a causal link [between emissions and effects] has been established by absolutely clear scientific evidence ...".

United Nations Conference on the Human Environment, 262/ the General Assembly 1982 resolution on the World Charter for Nature, 263/ the 1989 Amazon Declaration, 264/ the 1989 Draft American Declaration on the Environment, 265/ the 1988 ECE Declaration on Conservation of Flora, Fauna and their Habitats, 266/ the 1990 Bergen Ministerial Declaration on Sustainable Development in the ECE Region 267/ and the Hague Declaration on the Environment of 11 March 1989. 268/ The importance of maintaining "the ecological balance" 269/ in utilizing natural resources, and of following "the ecosystems approach" 270/ to the protection of water quality, have also been recognized in instruments adopted within the framework of the Conference on Security and Co-operation in Europe (CSCE). Finally the work of the World Commission on Environment and Development 271/ and its

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262/ United Nations publication, Sales No. E.73.II.A.14. See especially Principles 2 to 5 and 12.

263/ Resolution 37/7 of 28 October 1982.

264/ A/44/275 - E/1989/79, Annex.

265/ Organization of American States, document CJI/RES.II-10/89.

266/ Adopted by the Economic Commission for Europe at its forty-third session in 1988, decision E (43) (E/ECE/1172 and ECE/ENVWA/6). In the Declaration, the ECE Governments agree, inter alia, to pursue the aim of "conserv[ing] living natural resources in the interests of present and future generations by maintaining essential ecological processes and life-support systems, preserving genetic diversity and ensuring sustainable utilization of species and ecosystems ..." (Ibid. operative para. 1).

267/ The Declaration recognizes, inter alia, in its paragraph 6, that "The challenge of sustainable development of humanity depends on providing sustainability of the biosphere and its ecosystems ...".

268/ *International Legal Materials*, vol. XXVIII (1989), p. 1308.

269/ Helsinki Final Act (CSCE/CC/64), p. 54.

270/ Report on Conclusions and Recommendations of the 1989 Meeting on the Protection of the Environment of the Conference on Security and Co-operation in Europe, held in Sofia (CSCE/SEM.36/Rev.1), p. 12.

271/ *Our Common Future* (1987).

Experts Group on Environmental Law 272/ also emphasize that maintaining ecosystems and related ecological processes is essential to the achievement of sustainable development. 273/

Article 21

Prevention, reduction and control of pollution

1. For the purposes of this article, "pollution of an international watercourse" means any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct.

2. Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection.

3. Watercourse States shall, at the request of any of them, consult with a view to establishing lists of substances, the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored.

272/ Environmental Protection and Sustainable Development, Legal Principles and Recommendations (1987), p. 45, especially article 3, "Ecosystems, related ecological processes, biological diversity, and sustainability", at p. 45.

273/ See, to the same effect, the Environmental Perspective to the Year 2000 and Beyond, e.g. paras. 2 and 3(d), adopted by the Governing Council of the United Nations Environment Programme (Official Records of the General Assembly, Forty-second Session, Supplement No. 25, document A/42/25, annex II) and subsequently adopted by the General Assembly in resolution 42/186 of 11 December 1987 "as a broad framework to guide national action and international co-operation on policies and programmes aimed at achieving environmentally sound development".

Also to the same effect are certain provisions of the Constitution of the Republic of Namibia, which entered into force on 21 March 1990, including article 91 (concerning functions of the Ombudsman), para. (c), and article 95 (concerning "Promotion of the Welfare of the People"), para. (1). According to the latter, for example, "The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following: ... (1) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and the utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future ...".

Commentary

(1) Article 21 establishes the fundamental obligation to prevent, reduce and control the pollution of international watercourses. It contains three paragraphs, the first of which defines the term "pollution", while the second lays down the obligation just referred to, and the third establishes a procedure for drawing up agreed lists of dangerous substances that should be subjected to special controls.

(2) Paragraph 1 contains a general definition of the term "pollution", as that term is used in the present draft articles. While it contains the basic elements found in other definitions of the term, 274/ paragraph 1 is more general in several respects. First, it does not mention any particular type of pollution or polluting agent (e.g. substances or energy), unlike some other definitions. Second, the definition simply refers to "any detrimental alteration" and thus does not prejudge the question of the threshold at which pollution becomes impermissible. This threshold is addressed in paragraph 2. The definition is thus a purely factual one. It encompasses all pollution, whether or not it results in "significant harm" to other watercourse States within the meaning of article 7 and, more specifically, paragraph 2 of article 21. Third, in order to preserve the factual character of the definition, paragraph 1 does not refer to any specific "detrimental" effects, such as harm to human health, property or living resources. Examples of such effects that rise to the level of "significant harm" are provided in paragraph 2. The definition requires only that there be a detrimental

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274/ See, e.g. article IX of the Helsinki Rules (ILA, Report of the Fifty-Second Conference, Helsinki, 1966, p. 484); article I, para. 1, of the "Athens Resolution on the Pollution of Rivers and Lakes and International Law, adopted by the Institute of International Law in 1979 (Annuaire de l'Institut de droit international, vol. 58, - II (1979), p. 199); part A, para. 3, of the 1974 Principles concerning transfrontier pollution of the Organisation for Economic Co-operation and Development (OECD) (Recommendation C(74) 222 of 14 November 1974, reprinted in OECD and the Environment (1986)); article 2, para. 1, of the Montreal Rules of international law applicable to transfrontier pollution, adopted by the International Law Association in 1982, (ILA, Report of the Sixtieth Conference, Montreal, 1982); article 1, para. 4, of the 1982 United Nations Convention on the Law of the Sea; article 1 of the 1979 ECE Convention on long-range transboundary air pollution; article 1, para. (c), of the Council of Europe's 1969 draft European Convention on the protection of fresh water against pollution; and article 1, para. (d), of the Council of Europe's 1974 draft European Convention for the protection of international watercourses against pollution, in Yearbook ... 1974, vol. II (Part Two), document A/CN.4/274, para. 376.

alteration in the "composition or quality" of the water. The term "composition" refers to all substances contained in the water, including solutes, as well as suspended particulate matter and other insoluble substances. The term "quality" is commonly used in relation to pollution, especially in such expressions as "air quality" and "water quality". While it is difficult, and perhaps undesirable, to define the term precisely, it refers generally to the essential nature and degree of purity of water. Fourth, the definition does not refer to the means by which pollution is caused, such as by the "introduction" of substances, energy, etc., into a watercourse. It requires only that the "detrimental alteration" result from "human conduct". The latter expression is understood to include both acts and omissions, and was thus considered preferable to such terms as "activities". Finally, the definition does not include "biological" alterations. While there is no doubt that the introduction into a watercourse of alien or new species of flora and fauna may have harmful effects upon the quality of the water, the introduction of such living organisms is not generally regarded as "pollution" per se. Biological alterations are therefore the subject of a separate article, namely article 22.

(3) Paragraph 2 sets forth the general obligation of watercourse States to "prevent, reduce and control pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment ...". This paragraph is a specific application of the general principles contained in articles 5 and 7.

(4) In applying the general obligation of article 7 to the case of pollution, the Commission took into account the practical consideration that some international watercourses are already polluted to varying degrees, while others are not. In light of this state of affairs, it employed the formula "prevent, reduce and control" in relation to the pollution of international watercourses. This expression is utilized in the 1982 United Nations Convention on the Law of the Sea in connection with marine pollution, 275/ with respect to which the situation is similar. The obligation to "prevent" relates to new pollution of international watercourses, while the obligations to "reduce" and "control" relate to existing pollution. As with the obligation to "protect" ecosystems under article 20, the obligation to "prevent ... pollution ... that may cause significant harm" includes the duty

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275/ Article 194, para. 1.

to exercise due diligence to prevent the threat of such harm. 276/ This obligation is signified by the words "may cause". Furthermore, as in the case of article 20, the principle of precautionary action is applicable, especially in respect of dangerous substances such as those that are toxic, persistent or bioaccumulative. 277/ The requirement that watercourse States "reduce and control" existing pollution reflects the practice of States, in particular those in whose territories polluted watercourses are situated. This practice indicates a general willingness to tolerate even significant pollution harm, provided that the watercourse State of origin is making its best efforts to reduce the pollution to a mutually acceptable level. 278/ A requirement that existing pollution causing such harm be abated immediately could, in some cases, result in undue hardship, especially where the detriment to the watercourse State of origin was grossly disproportionate to the benefit that would accrue to the watercourse State experiencing the harm. 279/ On the other hand, failure of the watercourse State of origin to exercise due diligence in reducing the pollution to acceptable levels would entitle the affected State to claim that the State of origin had breached its obligation to do so.

(5) Like article 20, paragraph 2 of article 21 requires that the measures in question be taken "individually or jointly". The remarks made on paragraph (4) of the commentary to article 20 apply, mutatis mutandis, with regard to paragraph 2 of article 21. As explained in the commentary to article 20, the obligation to take joint action derives from certain general obligations contained in Part II of the draft articles. In the case of paragraph 2 of article 21, the obligation of watercourse States under article 5 to "participate in the ... protection of an international watercourse in an

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276/ See paragraph (3) of the commentary to article 20.

277/ See the commentary to article 20, especially paragraphs (3) and (9).

278/ See the fourth report of the previous Special Rapporteur (Yearbook ... 1988, vol. II (Part One), pp. 205 et seq. document A/CN.4/412 and Add.1 and 2), para. (11) of the comments to art. 16[17], at pp. 12-13. This assessment of the practice of States is also reflected in the most recent comprehensive study of the subject: see J. Lammers, Pollution of International Watercourses (1984), p. 301.

279/ This position is in accord with that taken in the Helsinki Rules. See especially comment (d) to art. XI (ILA, Report of the Fifty-Second Conference, Helsinki, 1966, pp.503-504).

equitable and reasonable manner", as well as that under article 8 to "cooperate ... in order to attain ... adequate protection of an international watercourse" may, in some situations, call for joint participation in the application of pollution control measures. 280/ These obligations contained in articles 5 and 8 are also relevant to the duty to harmonize policies, addressed in paragraph (7) below.

(6) The obligations of prevention, reduction and control all apply to pollution "that may cause significant harm to other watercourse States or to their environment". Pollution below that threshold would not fall within paragraph 2 but, depending upon the circumstances, might be covered either by article 20 or by article 23, to be discussed below. Several examples of significant harm that pollution may cause to a watercourse State or to its environment are provided at the end of the first sentence of paragraph 2. The list is not exhaustive, but is provided for purposes of illustration only. Pollution of an international watercourse may cause harm not only to "human health or safety" or to "the use of the waters for any beneficial purpose" 281/ but also to "the living resources of the international watercourse", flora and fauna dependent upon the watercourse, and the amenities connected with it. 282/ The term "environment" of other watercourse States is intended to encompass, in particular, matters of the

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280/ Such participation and cooperation may take a number of forms, including the provision of technical assistance, joint financing, the exchange of specific data and information, and similar forms of joint participation and cooperation. To the same effect, see comment (b) to art. X of the Helsinki Rules (ibid., p. 499).

281/ The Commission recognizes that it may be regarded as somewhat awkward to speak of "harm ... to the use of waters ...", but preferred not to use another expression (such as, for example, "interference with the use of the waters"), since other expressions could raise doubts as to whether a uniform standard was being applied in the case of each illustration. The present wording leaves no doubt that the same standard - that of significant harm - is utilized in all illustrations.

282/ Such amenities may include, e.g. the use of a watercourse for recreational purposes or for tourism.

latter kind. 283/ It is thus broader than the concept of the "ecosystem" of an international watercourse, which is the subject of article 20.

(7) The final sentence of paragraph 2 requires watercourse States to "take steps to harmonize their policies" concerning the prevention, reduction and control of water pollution. This obligation, which is grounded in treaty practice 284/ and which has a counterpart in the 1982 United Nations Convention on the Law of the Sea, 285/ addresses the problems that often arise when States adopt divergent policies, or apply different standards, concerning the pollution of international watercourses. The duty to harmonize policies is a specific application of certain of the general obligations contained in articles 5 and 8, mentioned in paragraph (5) of the commentary to this article, particularly the obligation of watercourse States under article 8 to "cooperate ... in order to attain ... adequate protection of an international watercourse". In the present case, this means that watercourse States are to work together in good faith to achieve and maintain harmonization of their policies concerning water pollution. Harmonization

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283/ Significant pollution harm to the "environment" of a watercourse State could also take the form of harm to human health in the form of diseases, or their vectors, carried by water. While harm to "human health" is expressly mentioned in paragraph 2, other forms of significant harm that are not directly connected with the use of water may also result from pollution of an international watercourse.

284/ International agreements concerning water pollution normally have as one of their explicit or implicit objects the harmonization of the relevant policies and standards of the watercourse States concerned. This is true whether the agreement concerns the protection of fisheries (see, e.g. article 17 of the 1904 Convention between France and Switzerland for the regulation of fishing in their frontier waters, (Legislative Texts, Treaty No. 196, p. 706)), or the prevention of adverse effects upon certain uses (see, e.g. article 4, para. 10 of the 1960 Indus Waters Treaty between India and Pakistan, Legislation Texts, Treaty No. 98, p. 300, or actually sets water quality standards and objectives (see, e.g. the 1978 Agreement between Canada and the United States on Great Lakes Water Quality (Treaties and other International Acts Series, No. 9257), e.g. art. II, note 239). Thus, harmonization may be achieved by agreement upon specific policies and standards or by requiring that pollution not exceed levels necessary for the protection of a particular resource, use of amenity. See generally the discussion of international agreements concerning water pollution in the fourth report of the previous Special Rapporteur (Yearbook ... 1988, vol. II (Part One), pp. 205 et seq. document A/CN.4/412 and Add.1 and 2, paras. 39-48).

285/ Article 194, para. 1.

of policies is thus a process in two different senses. First, initial achievement of harmonization will often involve several steps or stages; it is this aspect of the process that is addressed in paragraph 2, as indicated by the words "take steps". Second, even after policies have been successfully harmonized, continuing cooperative efforts will ordinarily be required to maintain their harmonization as conditions change. The entire process will necessarily depend on consensus among watercourse States.

(8) Paragraph 3 requires watercourse States to enter into consultations, if one or more of them should so request, with a view to drawing up lists of substances which, by virtue of their dangerous nature, should be subjected to special regulation. Such substances are principally those that are toxic, persistent or bioaccumulative. The practice of establishing lists of substances whose discharge into international watercourses is either prohibited or subject to special regulation has been followed in a number of international agreements and other instruments. 286/ States have made the discharge of these substances subject to special regimes because of their particularly dangerous and long-lasting nature. Indeed, the objective of some of the recent agreements dealing with these substances is to eliminate them entirely from the watercourses in question. 287/ The provision contained in

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286/ See, e.g. the 1976 Convention on the Protection of the Rhine against Chemical Pollution (United Nations, Treaty Series, vol. 1124, p. 375); and the 1978 Agreement between Canada and the United States on Great Lakes Water Quality, Treaties and other International Acts Series, No. 9257.

See also the Council of Europe's draft European Convention for the protection of international watercourses against pollution, Yearbook ... 1974, vol. II (Part Two), para. 376; article III, para. 2, of the Institute of International Law's Athens Resolution on the Pollution of Rivers and Lakes and International Law, Annuaire de l'Institut de droit international, 1979, vol. 58, - II, p. 199; and article 2 of the International Law Association's 1982 Montreal Rules on Water Pollution (ILA, Report of the Sixtieth Conference, Montreal, 1982), pp. 13, 535.

The same approach has also been used in the field of marine pollution. See especially the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (International Legal Materials, vol. XI (1972), p. 1294). This agreement separates harmful wastes into three categories: those whose discharge is prohibited altogether; those whose discharge is subject to a prior special permit; and those whose discharge is subject only to a prior general permit.

287/ Illustrations of such agreements are provided in the preceding footnote.

in paragraph 3 is in no way intended to suggest that pollution by substances is of any greater concern or effect than any other detrimental alteration resulting from human conduct such as the thermal consequences of energy.

(9) A detailed survey of representative illustrations of international agreements, the work of international organizations, decisions of international courts and tribunals, and other instances of State practice supporting article 21 is contained in the fourth report of the previous Special Rapporteur. 288/ A 1984 study lists 88 international agreements "containing substantive provisions concerning pollution of international watercourses". 289/ The work of international non-governmental organizations concerned with international law and groups of experts in this field has been particularly rich. 290/ These authorities evidence a long-standing concern of States with the problem of pollution of international watercourses.

Article 22

Introduction of alien or new species

> Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse which may have effects detrimental to the ecosystem of the watercourse resulting in significant harm to other watercourse States.

288/ Yearbook ... 1988, vol. II (Part One), pp. et seq., document A/CN.4/412/Add.1, paras. 38-88.

289/ J. Lammers, Pollution of International Waters (1984), pp. 124 et seq. See also the survey by J.J.A. Salmon, conducted in connection with the study by the Institute of International Law of "Les obligations relatives à la protection du milieu aquatique", in Annuaire de l'Institut de droit international, 1979, vol. 58, - I, pp. 195-200 and 268-271.

290/ This is especially true of the Institute of International Law and the International Law Association. For the Institute of International Law, see especially the 1979 Athens Resolution on the Pollution of Rivers and Lakes and International Law (Annuaire de l'Institut de droit international (1979) vol. 58). For the International Law Association, see the Helsinki Rules, arts. IX-XI; the 1982 Montreal Rules on water pollution in an international drainage basin, and the Seoul Rules on international groundwaters, art. 3 (Report of the ILA Committee on International Water Resources Law, Seoul Conference (1986), p. 38). See also the Legal Principles for Environmental Protection and Sustainable Development elaborated by the Experts Group on Environmental Law of the World Commission on Environment and Development, Environmental Protection and Sustainable Development, Legal Principles and Recommendations (1987) p. 45.

Commentary

(1) The introduction of alien or new species of flora or fauna into a watercourse can upset its ecological balance and result in serious problems including the clogging of intakes and machinery, the spoiling of recreation, the acceleration of eutrophication, the disruption of food webs, the elimination of other, often valuable species, and the transmission of disease. Once introduced, alien and new species can be highly difficult to eradicate. Article 22 addresses this problem by requiring watercourse States to take all measures necessary to prevent such introduction. A separate article is necessary to cover this subject because, as already noted, the definition of "pollution" contained in paragraph 1 of article 21 does not include biological alterations. 291/ A similar provision, relating to the protection of the marine environment, is contained in article 196 of the 1982 United Nations Convention on the Law of the Sea. 292/

(2) The term "species" includes both flora and fauna, i.e., plants, animals and other living organisms. 293/ The term "alien" refers to species that are non-native, while "new" encompasses species that have been genetically altered or produced through biological engineering. As is clear from its terms, the article concerns the introduction of such species only into the watercourse itself, and does not concern fish farming or other activities that are conducted outside the watercourse. 294/

(3) Article 22 requires watercourse States to "take all measures necessary" to prevent the introduction of alien or new species. This expression, which is also utilized in article 196 of the 1982 United Nations Convention on the Law of the Sea, indicates that watercourse States are to undertake studies, in so far as they are able, and take the precautions that are required to prevent alien or new species from being introduced into a watercourse by public authorities or private persons. The obligation is one of due diligence, and

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291/ See paragraph (2) of the commentary to article 21.

292/ Article 196, para. 1.

293/ Thus the term would include parasites and disease vectors.

294/ Appropriate precautionary measures may be required, however, to prevent any alien or new species involved in such activities from making their way into the watercourse.

will not be regarded as having been breached if a watercourse State has done all that can reasonably be expected to prevent the introduction of such species.

(4) The "introduction" that watercourse States are to take all measures necessary to prevent is one that "may have effects detrimental to the ecosystem of the watercourse resulting in significant harm to other watercourse States". While any introduction of an alien or new species into an international watercourse should be treated with great caution, the Commission was of the view that the relevant legal obligation under the draft articles should be kept in harmony with the general rule contained in article 7. Since detrimental effects of alien or new species will, almost invariably, manifest themselves first upon the ecosystem of a watercourse, this link between the "introduction" of the species and significant harm was included in the article. As in the case of paragraph 2 of article 21, the use of the word "may" indicates that precautionary action is necessary to guard against the very serious problems that alien or new species may cause. While the term "environment" was included for purposes of emphasis in paragraph 2 of article 21, it perhaps goes without saying that the "significant harm to other watercourse States" contemplated in the present article includes harm to the environment of those States. Finally, as is true of other aspects of the protection of international watercourses, joint as well as individual action may be called for in preventing the introduction of alien or new species into international watercourses.

Article 23

Protection and preservation of the marine environment

> Watercourse States shall, individually or jointly, take all measures with respect to an international watercourse that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

Commentary

(1) Article 23 addresses the increasingly serious problem of pollution that is transported into the marine environment by international watercourses. While the impact of such pollution upon the marine environment, including estuaries, has been recognized only relatively recently, it is now dealt with, directly or indirectly, in a number of agreements. In particular, the obligation not to cause pollution damage to the marine environment from

land-based sources is recognized both in the 1982 United Nations Convention on the Law of the Sea 295/ and in conventions concerning various regional seas. 296/

(2) The obligation set forth in article 23 is not, however, to protect the marine environment, per se, but to take measures "with respect to an international watercourse" that are necessary to protect that environment. But the obligation of watercourse States under article 23 is separate from, and additional to, the obligations set forth in articles 20 to 22. Thus, a watercourse State could conceivably damage an estuary through pollution of an international watercourse without breaching its obligation not to cause significant harm to other watercourse States. Article 23 would require the former watercourse State to take the measures necessary to protect and preserve the estuary.

(3) The expression "take all measures ... necessary" has the same meaning, mutatis mutandis, as in article 22. 297/ In the present case, watercourse States are to take all of the necessary measures of which they are capable, financially and technologically. The expression "individually or jointly" also has the same meaning, mutatis mutandis, as in articles 20 298/ and 21, paragraph 2. 299/ Thus, where appropriate, watercourse States are to take joint, cooperative action to protect the marine environment from pollution carried there by an international watercourse. Such action is to be taken on an equitable basis. The terms "protect" and "preserve" have the same meaning, mutatis mutandis, as in article 20. 300/ Without prejudice to its meaning in

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295/ See article 194, para. 3 (a), and article 207.

296/ See e.g. the agreements cited in International legal materials, vol. XIII (1974) pp. 352, 546; ibid., vol. XV (1976), p. 290; vol. XVII (1978) p. 511; and vol. XX (1980), p. 873. See also the Ministerial Declarations of the various International Conferences on the Protection of the North Sea: the First International Conference (Bremen, 31 October-1 November 1984); the Second International Conference (London, 24-25 November 1987); and the Third International Conference (The Hague, 8 March 1990).

297/ See paragraph (3) of the commentary to article 22 above.

298/ See paragraph (4) of the commentary to article 20 above.

299/ See paragraph (5) of the commentary to article 21 above.

300/ See paragraph (3) of the commentary to article 20 above.

the 1982 United Nations Convention on the Law of the Sea and other international agreements, the expression "marine environment" is understood to include, inter alia, the water, flora and fauna of the sea, as well as the sea-bed and ocean floor. 301/

(4) The article concludes with the phrase, "taking into account generally accepted international rules and standards", which has also been utilized in the 1982 United Nations Convention on the Law of the Sea. 302/ The phrase refers both to rules of general international law and to those derived from international agreements, as well as to standards adopted by States and international organizations pursuant to those agreements. 303/

Article 24

Management

1. Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.

2. For the purposes of this article, "management" refers, in particular, to:

(a) planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and

(b) otherwise promoting rational and optimal utilization, protection and control of the watercourse.

Commentary

(1) Article 24 recognizes the importance of cooperation by watercourse States in managing international watercourses with a view to ensuring their protection while maximizing benefits for all watercourse States concerned. It is intended to facilitate the consideration by watercourse States of modalities of management that are appropriate to the individual States and watercourses in question.

301/ The expression "marine environment" is not defined in the 1982 Convention. "Pollution of the marine environment" is, however, defined in article 1, para. 1 (4).

302/ See, e.g. article 211, para. 2.

303/ See, in particular, the agreements referred to in International legal materials, vol. XIII (1974) pp. 352, 546; ibid., vol. XV (1976) p. 290; vol. XVII (1978), p. 511; and vol. XX (1980), p. 873.

(2) Paragraph 1 requires that watercourse States enter into consultations concerning the management of an international watercourse if any watercourse State should so request. The paragraph does not require that watercourse States "manage" the watercourse in question, or that they establish a joint organization, such as a commission, or other management mechanism. The outcome of the consultations is left in the hands of the States concerned. States have, in practice, established numerous joint river, lake and similar commissions, many of which are charged with management of the international watercourses. Management of international watercourses may also be affected through less formal means, however, such as by the holding of regular meetings between the appropriate agencies or other representatives of the States concerned. Thus paragraph 1 refers to a joint management "mechanism" rather than an organization in order to provide for such less formal means of management.

(3) Paragraph 2 indicates in general terms the most common features of a programme of management of an international watercourse. The use of terms in this article such as "sustainable development" and "rational and optimal utilization" is to be understood as relevant to the process of management. It in no way affects the application of articles 5 and 7 which establish the fundamental basis for the draft articles as a whole. Planning the development of a watercourse so that it may be sustained for the benefit of present and future generations is emphasized in subparagraph (a) because of its fundamental importance. While joint commissions have proved an effective vehicle for carrying out such plans, the watercourse States concerned may also implement plans individually. The functions mentioned in subparagraph (b) are also common features of management regimes. Most of the specific terms contained in that subparagraph are derived from other articles of the draft, in particular article 5. The adjective "rational" indicates that the "utilization, protection and control" of an international watercourse should be planned by the watercourse States concerned, rather than being carried out on a haphazard or ad hoc basis. Together, subparagraphs (a) and (b) would include such functions as: planning of sustainable, multi-purpose and integrated development of international watercourses; facilitation of regular communication and exchange of data and information between watercourse States; and monitoring of international watercourses on a continuous basis.

(4) A review of treaty provisions concerning institutional arrangements, in particular, reveals that States have established a wide variety of

organizations for the management of international watercourses. Some agreements deal only with a particular watercourse while others cover a number of watercourses or large drainage basins. The powers vested in the respective commissions are tailored to the subject matter of the individual agreements. Thus, the competence of a joint body may be defined rather specifically where a single watercourse is involved and more generally where the agreement covers an international drainage basin or a series of boundary rivers, lakes and aquifers. Article 24 is cast in terms that are intended to be sufficiently general to be appropriate for a framework agreement. At the same time, the article is designed to provide guidance to watercourse States with regard to the powers and functions that could be entrusted to such joint mechanisms or institutions as they may decide to establish.

(5) The idea of establishing joint mechanisms for the management of international watercourses is hardly a new one. 304/ As early as 1911, the Institute of International Law recommended "that the interested States appoint permanent joint commissions" to deal with "new establishments or the making of alterations in existing establishments". 305/ Many of the early agreements concerning international watercourses, particularly those of the nineteenth century, were especially concerned with the regulation of navigation and fishing. 306/ The more recent agreements, especially those concluded since the Second World War, have focused more upon other aspects of the utilization or development of international watercourses, such as the

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304/ The 1754 Treaty of Vaprio between the Empress of Austria, in her capacity as Duchess of Milan and the Republic of Venice, entrusted a pre-existing joint boundary commission with functions relating to the common use of the river Ollia (Parry, The Consolidated Treaty Series, vol. 40, pp. 215-228). Another early example is found in the 1785 Treaty of Fontainebleau between Austria and the Netherlands, which formed a bipartite body to determine the best sites for the joint construction of locks on the River Meuse (Martens, Recueil des Traités, 2nd ed., vol. 4, p. 55, also referred to in the 1952 report of the Economic Commission for Europe (ECE), "Legal aspects of hydroelectric development of rivers and lakes of common interest", document E/ECE/136-E/ECE/EP/98/Rev.1, paras. 175 et seq.).

305/ Resolution on "International regulations regarding the use of international watercourses" (Annuaire de l'Institut de droit international, 1911, vol. 24, pp. 365-367, reproduced in Yearbook ... 1974, vol. II (Part Two), p. 200, document A/5409, para. 1071).

306/ An illustrative survey may be found in the fourth report of the previous Special Rapporteur, Yearbook ... 1988, vol. II (Part One), pp. 205 et seq. document A/CN.4/412 and Add.1 and 2, paras. 39-48.

development potential of the watercourse, irrigation, flood control, hydroelectric power generation and pollution. 307/ These kinds of uses, which took on greater importance due to the intensified demand for water, food and electricity, have necessitated to a much greater degree the establishment of joint management mechanisms. Today there are nearly as many such mechanisms as there are major international watercourses. 308/ They may be ad hoc or permanent, and they possess a wide variety of functions and powers. 309/ Article 24 takes into account not only this practice of watercourse States, but also the recommendations of conferences and meetings held under United Nations auspices to the effect that those States should

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307/ This point is illustrated by the discussion of "Multilateral agreements" in United Nations Management of international water resources: institutional and legal aspects, Natural Resources/Water Series No. 1 (United Nations publication, Sales No. E.75.II.A.2) (1987), pp. 33-36, especially p. 34.

308/ A survey of multipartite and bipartite commissions concerned with non-navigational uses of international watercourses, compiled by the Secretariat in 1979, lists 90 such bodies (Annotated list of multipartite and bipartite commissions concerned with non-navigational uses of international watercourses, April 1979 (unpublished)). While the largest number of the commissions listed deal with watercourses in Europe, every region of the world is represented and the number of commissions was increasing in developing countries, particularly on the African continent, at the time the list was prepared (ibid., p. ii).

309/ For summary descriptions of some of these agreements, "selected to illustrate the widest possible variety of arrangements", see ibid., annex IV. See also the list of agreements setting up joint machinery for the management of international watercourses in ILA. Report of the Fifty-seventh Conference, Madrid, 1976, pp. 256-266; and N. Ely and A. Wolman, "Administration", The Law of International Drainage Basins, p. 124; and the sixth report of the previous Special Rapporteur, Yearbook ... 1990, vol. II (Part One), pp. 41 et seq. document A/CN.4/427 and Add.1, paras. 3-6. The kinds of functions and powers that have been conferred upon joint management mechanisms are illustrated in the following three agreements from three separate continents: the Convention creating the Niger Basin Authority, 21 November 1980 (Benin, Cameroon, Chad, Ivory Coast, Guinea, Mali, Niger, Nigeria, Upper Volta), arts. 3-5 (Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation, Natural Resources/Water Series No. 13, Treaty No. 13, at p. 56); the Indus Waters Treaty, 19 September 1960 (India and Pakistan) (Legislative Texts, Treaty No. 98, p. 300); and the Treaty between Canada and the United States relating to boundary waters, and questions arising between the United States and Canada, 11 January 1909 (ibid., Treaty No. 79, p. 260).

consider establishing joint management mechanisms in order to attain maximum possible benefits from and protection of international watercourses. 310/

Article 25

Regulation

> 1. Watercourse States shall cooperate, where appropriate, to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.
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> 2. Unless otherwise agreed, watercourse States shall participate on an equitable basis in the construction and maintenance or defrayal of the costs of such regulation works as they may have agreed to undertake.
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> 3. For the purposes of this article, "regulation" means the use of hydraulic works or any other continuing measure to alter, vary or otherwise control the flow of the waters of an international watercourse.

Commentary

(1) Article 25 deals with the regulation, by watercourse States, of the flow of waters of an international watercourse. Regulation of the flow of watercourses is often necessary both to prevent harmful effects of the current, such as floods and erosion, and to maximize the benefits that may be obtained from the watercourse. The article consists of three paragraphs, setting forth respectively the basic obligation in respect of regulation, the duty of equitable participation as it applies to regulation, and a definition of the term "regulation".

(2) Paragraph 1 is a specific application of the general obligation to cooperate provided for in article 8. The paragraph requires watercourse States to cooperate, where appropriate, specifically with regard to needs and opportunities for regulation. As indicated in the preceding paragraph of this commentary, such needs and opportunities would normally relate to the prevention of harm and the increasing of benefits from the international

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310/ See, e.g. the Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14), Chap. II, "Action Plan for the Human Environment", recommendation 51; and United Nations Economic Commission for Africa, Department of Technical Cooperation for Development, Interregional Meeting on River and Lake Development, with emphasis on the African region, Addis Ababa, Ethiopia, 10-16 October 1988, Report of the Meeting, document ECA/NRD/IMRLBD/42, 14 October 1988, pp. 35-37. The work of international organizations in this field is surveyed in the sixth report of the previous Special Rapporteur, A/CN.4/427, paras. 7-17.

watercourse in question. The words "where appropriate" emphasize that the obligation is not to seek to identify needs and opportunities, but to respond to those that exist.

(3) Paragraph 2 applies to situations in which watercourse States have agreed to undertake works for the regulation of the flow of an international watercourse. It is a residual rule which requires watercourse States to "participate on an equitable basis" in constructing, maintaining, or defraying the costs of those works unless they have agreed on some other arrangement. This duty is a specific application of the general obligation of equitable participation contained in article 5. It does not require watercourse States to "participate", in any way, in regulation works from which they derive no benefit. It would simply mean that when one watercourse State agrees with another to undertake regulation works, and receives benefits therefrom, the former would be obligated, in the absence of agreement to the contrary, to contribute to the construction and maintenance of the works in proportion to the benefits it received therefrom.

(4) Paragraph 3 contains a definition of the term "regulation". The definition identifies, first, the means of regulation, i.e., "hydraulic works or any other continuing measure" and, second, the objectives of regulation, i.e., "to alter, vary or otherwise control the flow of the waters". Specific means of regulation commonly include such works as dams, reservoirs, weirs, canals, embankments, dykes, and river bank fortifications. They may be used for such objectives as regulating the flow of water, so as to prevent floods in one season and drought in another; guarding against serious erosion of river banks or even changes in the course of a river; and assuring a sufficient supply of water, e.g., to keep pollution within acceptable limits, or to permit such uses as navigation and timber floating. Making the flow of water more consistent through regulation or control works can also extend periods during which irrigation is possible, permit or enhance the generation of electricity, alleviate siltation, prevent the formation of stagnant pools in which the malarial mosquito may breed, and sustain fisheries. However, regulation of the flow of an international watercourse may also have adverse effects upon other watercourse States. For example, a dam may reduce seasonal flows of water to a downstream State or flood an upstream State. The fact that regulation of the flow of water may be necessary to achieve optimal

utilization and, at the same time, potentially harmful, demonstrates the importance of cooperation between watercourse States in the manner provided for in article 25.

(5) The numerous treaty provisions concerning regulation of the flow of international watercourses demonstrate that States recognize the importance of cooperation in this respect. 311/ This practice and the need for strengthening cooperation among watercourse States with regard to regulation has also led an organization of specialists in international law to elaborate a set of general rules and recommendations concerning the regulation of the flow of international watercourses. 312/ The present article, which was inspired by the practice of States in this field, contains general obligations, appropriate for a framework instrument, relating to a subject of concern to all watercourse States.

Article 26

Installations

> 1. Watercourse States shall, within their respective territories, employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse.

311/ A number of these provisions are referred to in the fifth report of the previous Special Rapporteur, Yearbook ... 1989, vol. II (Part One), pp. 91 et seq. document A/CN.4/421 and Add.1 and 2, paras. 131-138. Representative examples include the 1959 Agreement between the Soviet Union, Norway and Finland concerning the regulation of Lake Inari by means of the Kaitakoski hydroelectric power station and dam (United Nations, Treaty Series, vol. 346, p. 167); the 1944 Treaty between the United States and Mexico relating to the utilization of the waters of the Colorado and Tijuana rivers and the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico (ibid., vol. 3, p. 313); the 1959 Agreement between the United Arab Republic and the Sudan for the full utilization of the Nile waters (ibid., vol. 453, p. 51); the 1969 Treaty of the La Plata River Basin (Argentina, Bolivia, Brazil, Paraguay and Uruguay) (art. I, para. (b) (ibid., vol. 875, p. 11); and the 1960 Indus Waters Treaty between India and Pakistan, Legislative Texts, Treaty No. 98, pp. 325-332 (Annexure E).

312/ At its 1980 Conference in Belgrade, the International Law Association adopted nine articles on the Regulation of the Flow of Water of International Watercourses, ILA, Report of the Fifty-ninth Conference, Belgrade, 1980, p. 4. The articles are set forth in the fifth report of the Special Rapporteur, Yearbook ... 1989, vol II (Part One), pp. 91 et seq., document A/CN.4/421 and Add.1 and 2, para. 139.

2. Watercourse States shall, at the request of any of them which has serious reason to believe that it may suffer significant adverse effects, enter into consultations with regard to:

(a) the safe operation or maintenance of installations, facilities or other works related to an international watercourse; or

(b) the protection of installations, facilities or other works from wilful or negligent acts or the forces of nature.

Commentary

(1) Article 26 concerns the protection of installations, such as dams, barrages, dykes and weirs from damage due to deterioration, the forces of nature or human acts, which may result in significant harm to other watercourse States. The article consists of two paragraphs which, respectively, lay down the general obligation and provide for consultations concerning the safety of installations.

(2) Paragraph 1 requires that watercourse States employ their "best efforts" to maintain and protect the works there described. Watercourse States may fulfil this obligation by doing what is within their individual capabilities to maintain and protect installations, facilities and other works related to an international watercourse. Thus, for example, a watercourse State should exercise due diligence to maintain a dam, i.e., keep it in good order, such that it will not burst, causing significant harm to other watercourse States. Similarly, all reasonable precautions should be taken to protect such works from foreseeable kinds of damage due to forces of nature, such as floods, or to human acts, whether wilful or negligent. The wilful acts in question would include terrorism and sabotage, while negligent conduct would encompass any failure to exercise ordinary care under the circumstances which resulted in damage to the installation in question. The words "within their respective territories" reflect the fact that maintenance and protection of works are normally carried out by the watercourse State in whose territory the works in question are located. Paragraph 1 in no way purports to authorize, much less require, one watercourse State to maintain and protect works in the territory of another watercourse State. However, there may be circumstances in which it would be appropriate for a watercourse State to participate in the maintenance and protection of works outside its territory as, for example, where it operated the works jointly with the State in which they were situated.

(3) Paragraph 2 establishes a general obligation of watercourse States to enter into consultations concerning the safe operation, maintenance or

protection of water works. The obligation is triggered by a request of a watercourse State "which has serious reason to believe that it may suffer significant adverse effects" arising from the operation, maintenance or protection of the works in question. Thus, in contrast to paragraph 1, this paragraph deals with exceptional situations in which a watercourse State perceives the possibility of a particular danger. The cases addressed in paragraph 2 should also be distinguished from "emergency situations" under article 28. While the situations dealt with in the latter article involve, inter alia, an imminent threat, the danger under paragraph 2 of the present article need not be an imminent one, although it should not be so remote as to be minimal. The requirement that a watercourse State have a "serious reason to believe" that it may suffer adverse effects constitutes an objective standard, and requires that there be a realistic danger. The phrase "serious reason to believe" is also used in article 18 and has the same meaning as in that article. This requirement conforms with State practice, since States generally hold consultations when there are reasonable grounds for concern about actual or potential adverse effects. Finally, the expression "significant adverse effects" has the same meaning as in article 12. Thus the threshold established by this standard is lower than that of "significant harm". 313/

(4) The obligation to enter into consultations under paragraph 2 applies to significant adverse effects that may arise in two different ways. First, such effects may arise from the operation or maintenance of works. Thus, subparagraph (a) provide for consultations concerning the operation or maintenance of works in a safe manner. Second, adverse effects upon other watercourse States may result from damage to water works due to wilful or negligent acts, due to the forces of nature. Thus, if a watercourse State had serious reason to believe that it could be harmed by such acts or forces, it would be entitled, under subparagraph (b) of paragraph 2, to initiate consultations concerning the protection of the works in question from such acts as terrorism and sabotage, or such forces as landslides and floods.

(5) The concern of States for the protection and safety of installations is reflected in international agreements. Some agreements involving hydroelectric projects contain specific provisions concerning the design of

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313/ See paragraph (2) of the commentary to article 12.

installations 314/ and provide that plans for the works may not be carried out without the prior approval of the parties. 315/ States have also made provision in their agreements for ensuring the security of works through the enactment of domestic legislation by the State in whose territory the works are situated. 316/ Article 26 does not go so far, but lays down general, residual rules intended to provide for basic levels of protection and safety of works related to international watercourses.

PART V. HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

Article 27

Prevention and mitigation of harmful conditions

> Watercourse States shall, individually or jointly, take all appropriate measures to prevent or mitigate conditions that may be harmful to other watercourse States, whether resulting from natural causes or human conduct, such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.

Commentary

(1) Article 27 deals with a wide variety of "conditions" related to international watercourses that may be harmful to watercourse States. While it may be debated whether the harm results from the condition itself or from the effects thereof, there is no doubt that such problems as floods, ice floes, drought and water-borne diseases, to mention only a few, are of serious consequence for watercourse States. The present article is concerned with the prevention and mitigation of such conditions while article 28 deals with the obligation of watercourse States in responding to actual emergency situations.

314/ An example is the Convention of 1957 between Switzerland and Italy concerning the use of the water power of the Spöl, art. 8 (*Legislative Texts*, Treaty No. 235, at p. 862; summarized in *Yearbook ... 1974*, vol. II (Part Two), p. 161, document A/5409, paras. 849-854).

315/ See the 1963 Convention between France and Switzerland on the Emosson hydroelectric project, art. 2, in *Revue générale de droit international public* (Paris), 3rd series, vol XXXVI, No. 1 (January-March, 1965), p. 571; summarized in *Yearbook ... 1974*, vol. II (Part Two), p. 311, document A/CN.4/para. 229.

316/ Ibid., article 2.

The measures called for in preventing and mitigating these conditions are of an anticipatory nature and are thus quite different from those involved in responding to emergencies.

(2) Like articles 20, 21 and 23, the present article requires that the measures in question be taken "individually or jointly". As in the case of those articles, this expression is an application of the general obligation of equitable participation set forth in article 5. The requirement that watercourse States take "all appropriate measures" means that they are to take measures that are tailored to the situation involved, and that are reasonable in view of the circumstances of the watercourse State in question. It takes into account the capabilities of watercourse States, in so far as their means of knowing of the conditions and their ability to take the necessary measures are concerned.

(3) The conditions dealt with in article 27 may result from natural causes, human conduct, or a combination of the two. 317/ The expression "natural causes or human conduct" comprehends each of these three possibilities. While States cannot prevent phenomena resulting entirely from natural causes, they can do much to prevent and mitigate harmful conditions that are consequent upon such phenomena. For example, floods may be prevented, or their severity mitigated, through the construction of reservoirs, afforestation, or improved range management practices.

(4) The list of conditions provided at the end of the article is non-exhaustive, but includes most of the major problems that the article is intended to address. Other conditions covered by the article include drainage problems and flow obstructions. Drought and desertification may not, at first glance, seem to fit in with the other problems mentioned since, unlike the others, they are the result of the lack of water rather than the harmful effects of it. But the effects of a drought, for example, may be seriously exacerbated by improper water management practices. 318/ And States situated in regions subject to droughts and desertification have demonstrated their determination to cooperate with a view to controlling and mitigating these

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317/ For example, floods and siltation may result from deforestation coupled with heavy rains. Or a flood may be caused by earthquake damage to a dam.

318/ See, e.g. Report of the United Nations Water Conference, (E/CONF.70/29), p. 112.

problems. 319/ In view of the severity of these problems, and of the fact that cooperative action among watercourse States can do much to prevent or mitigate them, they are expressly mentioned in the article.

(5) The kinds of measures that may be taken under article 27 are many and varied. They range from the regular and timely exchange of data and information that would be of assistance in preventing and mitigating the conditions in question, to taking all reasonable steps to ensure that activities in the territory of a watercourse State are so conducted as not to cause conditions that may be harmful to other watercourse States. They may also include the holding of consultations concerning the planning and implementation of joint measures, whether or not involving the construction of works, and the preparation of studies of the efficacy of measures that have been taken.

(6) Article 27 is based upon the provisions of numerous treaties, 320/ decisions of international courts and tribunals, State practice, and the work of international organizations. 321/ Representative examples have been surveyed and analysed in the fifth report of the previous Special Rapporteur. 322/

319/ See, e.g. article 4, para. 2 (c) (iv) and (d) (iv) of the 1980 Convention creating the Niger Basin Authority, which provides that the Authority shall undertake activities relating to the "[p]revention and control of drought and desertification ...", reproduced in Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation; Natural Resources/Water Series No. 13, pp. 58 and 59. See also the 1973 Convention establishing a Permanent Inter-State Committee on Drought Control in the Sahel, art. 4, subparas. (i) and (iv), (document A/9178).

320/ See, e.g. the systematized collection of treaty provisions concerning floods in the report submitted in 1972 by the Committee on International Water Resources Law of the International Law Association (ILA, Report of the Fifty-Fifth Conference, New York, 1972, Part II, Flood Control, pp.43-97). A number of these agreements require consultation, notification, the exchange of data and information, the operation of warning systems, the preparation of surveys and studies, the planning and execution of flood control measures, and the operation and maintenance of works.

321/ See especially the articles on flood control adopted in 1972 by the International Law Association (ibid.).

322/ A/CN.4/421 and Add.1, paras. 2-116.

Article 28

Emergency situations

1. For the purposes of this article, "emergency" means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct, such as industrial accidents.

2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.

3. A watercourse State within whose territory an emergency originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.

4. When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other potentially affected States and competent international organizations.

Commentary

(1) Article 28 deals with the obligations of watercourse States in responding to actual emergency situations that are related to international watercourses. It is to be contrasted with article 27 which concerns the prevention and mitigation of conditions that may be harmful to watercourse States. [323]

(2) Paragraph 1 defines the term "emergency". The definition contains a number of important elements, and includes several examples that are provided for purposes of illustration. As defined, an "emergency" must cause, or imminently threaten, "serious harm" to watercourse States "or other States". The seriousness of the harm involved, together with the suddenness of the emergency's occurrence, justifies the measures required by the article. The expression "other States" refers to non-watercourse States that might be affected by an emergency. These would usually be coastal States that could be harmed by, e.g. a chemical spill transported by an international watercourse into the sea. The situation constituting an emergency must arise "suddenly". This does not necessarily mean, however, that the situation need be wholly unexpected. For example, weather patterns may provide an advance indication

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[323] See para. (1) of the commentary to that article.

that a flood is likely. Because this situation would pose "an imminent threat of causing [ ] serious harm to watercourse States", a watercourse State in whose territory the flood is likely to originate would be obligated under paragraph 2 to notify other potentially affected States of the emergency. Finally, the situation may result either "from natural causes ... or from human conduct". While there may well be no liability on the part of a watercourse State for the harmful effects in another watercourse State of an emergency originating in the former and resulting entirely from natural causes, the obligations under paragraphs 2 and 3 would none the less apply to such an emergency. 324/

(3) Paragraph 2 requires a watercourse State within whose territory an emergency originates to notify, "without delay and by the most expeditious means available", other potentially affected States and competent international organizations. Similar obligations are contained, for example, in the 1986 Convention on early notification of a nuclear accident, 325/ the 1982 United Nations Convention on the Law of the Sea 326/ and a number of agreements concerning international watercourses. 327/ The words "without delay" mean immediately upon learning of the emergency, and the phrase "by the most expeditious means available" means that the most rapid means of communication that is accessible is to be utilized. The States to be notified are not confined to watercourse States since, as explained above, non-watercourse States may be affected by an emergency. The paragraph also calls for the notification of "competent international organizations". Such an organization would have to be competent to participate in responding to the

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324/ Thus, the breach of one of those obligations would engage the responsibility of the State in question.

325/ International Legal Materials, vol. XXV (1986), p. 1370, art. 2, at p. 1371.

326/ Article 198.

327/ See, e.g. the 1976 Convention on the protection of the Rhine against chemical pollution, art. 11, (United Nations, Treaty Series, vol. 1124, p. 375; the 1978 Agreement between Canada and the United States on Great Lakes Water Quality (Treaties and Other International Acts Series, No. 9257); and the 1977 Convention concerning accidental pollution of Lake Geneva (1977 Official Collection of Swiss Laws, p. 2204), reproduced in Ruester, Simma and Bock, International Protection of the Environment, vol. XXV (1981), p. 285.

emergency by virtue of its constituent instrument. Most frequently, such an organization would be one established by the watercourse States to deal, inter alia, with emergencies. 328/

(4) Paragraph 3 requires that a watercourse State within whose territory an emergency originates "immediately take all practicable measures ... to prevent, mitigate and eliminate harmful effects of the emergency". The most effective action to counteract most emergencies resulting from human conduct is that taken where the industrial accident, vessel grounding or other incident occurs. But the paragraph requires only that all "practicable" measures be taken, meaning those that are feasible, workable and reasonable. Further, only such measures as are "necessitated by the circumstances" need be taken, meaning those that are warranted by the factual situation of the emergency and its possible effect upon other States. Like paragraph 2, paragraph 3 foresees the possibility that there will be a competent international organization, such as a joint commission, with which the watercourse State may cooperate in taking the requisite measures. And finally, cooperation with potentially affected States (again including non-watercourse States) is also provided for. Such cooperation may be especially appropriate in the case of contiguous watercourses or where a potentially affected State is in a position to render assistance on the territory of the watercourse State where the emergency originated.

(5) Paragraph 4 contains an obligation that is different in character from those contained in the two preceding paragraphs, in that it calls for anticipatory rather than responsive action. The need for the development of contingency plans for responding to possible emergencies is now well recognized. For example, article 199 of the 1982 United Nations Convention on the Law of the Sea provides that "States shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment".

(6) The obligation set forth in paragraph 4 is qualified by the words "when necessary", in recognition of the fact that the circumstances of some watercourse States and international watercourses may not justify the effort and expense that are involved in the development of contingency plans. Whether such plans would be necessary would depend, for example, upon whether

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328/ See, e.g. article 11 of the Convention on the Protection of the Rhine against Chemical Pollution (United Nations, Treaty Series, vol. 1124, p. 375).

the characteristics of the natural environment of the watercourse, and the uses made of the watercourse and adjacent land areas, would indicate that it was possible for emergencies to arise.

(7) While watercourse States bear the primary responsibility for developing contingency plans, in many cases it will be appropriate to prepare them in cooperation with "other potentially affected States and competent international organizations". For example, the establishment of effective warning systems may necessitate the involvement of other, non-watercourse States as well as international organizations with competence in that particular field. In addition, the coordination of response efforts might be most effectively handled by a competent international organization set up by the States concerned.

PART VI. MISCELLANEOUS PROVISIONS

Article 29

International watercourses and installations in time of armed conflict

> International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules.

Commentary

(1) Article 29 concerns the protection to be accorded to, and the use of international watercourses and related installations in time of armed conflict. The article, which is without prejudice to existing law, does not lay down any new rule. It simply serves as a reminder that the principles and rules of international law applicable in international and internal armed conflict contain important provisions concerning international watercourses and related works. These provisions fall generally into two categories: those concerning the protection of international watercourses and related works; and those dealing with the use of such watercourses and works. Since detailed regulation of this subject matter would be beyond the scope of a framework instrument, article 29 does no more than to refer to each of these categories of principles and rules.

(2) The principles and rules of international law that are "applicable" in a particular case are those that are binding on the States concerned. Just as article 29 does not alter or amend existing law, it also does not purport to

extend the applicability of any instrument to States not parties to that instrument. On the other hand, article 29 is not addressed only to watercourse States, in view of the fact that international watercourses and related works may be used or attacked in time of armed conflict by other States as well. While a State not party to the present articles would not be bound by this provision per se, inclusion of non-watercourse States within its coverage was considered necessary both because of the signal importance of the subject and since the article's principal function is, in any event, merely to serve as a reminder to States of the applicability of the law of armed conflict to international watercourses.

(3) Of course, the present articles themselves remain in effect even in time of armed conflict. The obligation of watercourse States to protect and use international watercourses and related works in accordance with the articles remains in effect during such times. Warfare may, however, affect an international watercourse as well as the protection and use thereof by watercourse States. In such cases, article 29 makes clear that the rules and principles governing armed conflict apply. For example, the poisoning of water supplies is prohibited by the Hague Conventions of 1907 Concerning the Laws and Customs of Land Warfare 329/ and article 54 of Protocol I of 1977 Additional to the Geneva Conventions of 12 August 1949, 330/ while article 56 of that Protocol protects dams, dikes and other works from attacks that "may cause the release of dangerous forces and consequent severe losses among the civilian population". 331/ Similar protections apply in non-international armed conflicts under articles 14 and 15 of Protocol II Additional to the 1949 Geneva Conventions. Also relevant to the protection of international watercourses in time of armed conflict is the provision of Protocol I that "Care shall be taken in warfare to protect the natural environment against

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329/ Article 23 of the Regulations annexed to the Convention concerning the Laws and Customs of Land Warfare, in American Journal of International Law, vol. 2 (1908), p. 106. For a commentary on article 23, see L. Oppenheim, International Law: A Treatise, 7th ed., H. Lauterpacht, ed., vol. 2, p. 340, sect. 110.

330/ Article 54, para. 2.

331/ Article 56, para. 1.

widespread, long-term and severe damage." 332/ In cases not covered by a specific rule, certain fundamental protections are afforded by the "Martens clause". That clause, which was originally inserted in the Preamble of the Hague Conventions of 1899 and 1907 and has subsequently been included in a number of conventions and protocols, 333/ now has the status of general international law. In essence, it provides that even in cases not covered by specific international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience. The same general principle is expressed in article 10 of the present draft articles, which provides that in reconciling a conflict between uses of an international watercourse, special attention is to be paid to the requirements of vital human needs.

Article 30

Indirect procedures

> In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall fulfil their obligations of cooperation provided for in the present articles, including exchange of data and information, notification, communication, consultations and negotiations, through any indirect procedure accepted by them.

Commentary

Article 30 addresses the exceptional case in which direct contacts cannot be established between the watercourse States concerned. As already mentioned in the commentary to article 9 (para. (3)), circumstances such as an armed conflict or the absence of diplomatic relations may raise serious obstacles to the kinds of direct contacts provided for in articles 9 to 19. Even in such

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332/ Protocol I, article 55, para. 1. A more general provision to the same effect is contained in article 35 (Basic Rules), para. 3 of the same Protocol.

333/ For example, Protocol for the Prohibition of Poisonous Gases and Bacteriological Methods of Warfare of 17 June 1925 (Preamble, paras. 1 and 3); the Geneva Conventions of 12 August 1949 (Convention I, art. 63, para. 4; Convention II, art. 62, para. 4; Convention III, art. 142, para. 4; and Convention IV, art. 158, para. 4); Protocol I Additional to the 1949 Geneva Conventions (art. 1, para. 2); and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (Preamble, para. 5).

circumstances, however, there will often be channels which the States concerned utilize for the purpose of conveying communications to each other. Examples of such channels are third countries, armistice commissions and the good offices of international organizations. Article 30 requires that the various forms of contact provided for in articles 9 to 19 be effected through any channel, or "indirect procedure", which has been accepted by the States concerned. All the forms of contact required by articles 9 to 19 are covered by the expressions employed in article 30, namely "exchange of data and information, notification, communication, consultations and negotiations".

Article 31

Data and information vital to national defence or security

> Nothing in the present articles obliges a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall cooperate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

Commentary

Article 31 creates a very narrow exception to the requirements of articles 9 to 19. The Commission is of the view that States cannot realistically be expected to agree to the release of information that is vital to their national defence or security. At the same time, however, a watercourse State that may experience adverse effects of planned measures should not be left entirely without information concerning those possible effects. Article 31 therefore requires a State withholding information to "cooperate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances". The "circumstances" referred to are those that led to the withholding of the data or information. The obligation to provide "as much information as possible" could be fulfilled in many cases by furnishing a general description of the manner in which the measures would alter the condition of the water or affect other States. The article is thus intended to achieve a balance between the legitimate needs of the States concerned: the need for the confidentiality of sensitive information, on the one hand, and the need for information pertaining to possible adverse effects of planned measures, on the other. As always, the exception created by article 31 is without prejudice to the obligations of the planning State under articles 5 and 7.

Article 32

Non-discrimination

Unless the watercourse States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who have suffered or are under a serious threat of suffering significant transboundary harm as a result of activities related to an international watercourse, a watercourse State shall not discriminate on the basis of nationality or residence or place where the injury occurred, in granting to such persons, in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on under its jurisdiction.

Commentary

(1) Article 32 sets out the basic principle that watercourse States are to grant access to their judicial and other procedures without discrimination on the basis of nationality, residence or the place where the damage occurred.

(2) The article contains two basic elements, namely, non-discrimination on the basis of nationality or residence and non-discrimination on the basis of where the harm occurred. The rule set forth obliges States to ensure that any person, whatever his nationality or place of residence, who has suffered significant transboundary harm as a result of activities related to an international watercourse should, regardless of where the harm occurred or might occur, receive the same treatment as that afforded by the country of origin to its nationals in case of domestic harm. This obligation would not affect the existing practice in some States of requiring that non-residents or aliens post a bond, as a condition of utilizing the court system, to cover court costs or other fees. Such a practice is not "discriminatory" under the article, and is taken into account by the phrase "in accordance with its legal systems". As indicated by the words, "has suffered or is under a serious threat of suffering significant transboundary harm", the rule of non-discrimination applies both to cases involving actual harm and to those in which the harm is prospective in nature. Since cases of the latter kind can often be dealt with most effectively through administrative proceedings, the article, in referring to "judicial or other procedures", requires that access be afforded on a non-discriminatory basis both to courts and to any applicable administrative procedures.

(3) The rule is a residual one as denoted by the phrase "Unless the States concerned have agreed otherwise ...". This means that States may agree otherwise on the best means of providing relief to persons who have suffered

or are under a serious threat of suffering significant harm, for example through diplomatic channels. The phrase for the protection of the interests of persons who have suffered ... has been used to make it clear that the phrase "agreed otherwise" is not intended to suggest that States decide by mutual agreement to discriminate in granting access to their judicial or other procedures or a right to compensation. It makes it clear that the purpose of the inter-State agreement should always be the protection of the interests of the victims or potential victims of the harm. Rather it is intended to permit the matter to be handled at the diplomatic or State to State level, should the States concerned agree so to do.

(4) The article also provides that States may not discriminate on the basis of the place where the damage occurred. In other words, if significant harm is caused in State A as a result of conduct in State B, State B may not bar an action on the grounds that the harm occurred outside its jurisdiction. 334/

(5) One member of the Commission found the article as a whole unacceptable on the ground that the draft articles deal with relations between States and should not extend into the field of actions by natural or legal persons under domestic law. Two members of the Commission held the view that the article was undesirable within the broad scope of the present articles because it may be interpreted as establishing an obligation of States to grant to foreign nationals based on their respective territories rights which not only procedurally but also in all other respects would be equal to the rights of their own nationals. In the view of those members, such a broadening of the principle of the exhaustion of local remedies would not correspond to the present content of this principle.

(6) Precedents for the obligation contained in article 32 may be found in international agreements and in recommendations of international

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334/ It might be noted that the international arbitration in the Trail Smelter Arbitration was required because the local courts of the State from which the fumes emanated did not at the time recognize the right of redress for injuries which occurred outside its jurisdiction even though the damage was caused by operations within its jurisdiction.

organizations. For example, the Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden of 19 February 1974 provides as follows:

> "Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court of the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out.
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> "The provisions of the first paragraph of this article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured party than the rules of compensation of the State in which the activities are being carried out." 335/

The Council of the Organization for Economic Cooperation and Development (OECD) has adopted a Recommendation on Implementation of a regime of equal right of access and non-discrimination in relation to transfrontier pollution. Paragraph 4 (a) of that Recommendation provides as follows:

> "Countries of origin should ensure that any person who has suffered transfrontier pollution damage or is exposed to a significant risk of transfrontier pollution, shall at least receive equivalent treatment to

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335/ Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden of 19 February 1974, art. 3 (United Nations, Treaty Series, vol. 1092, p. 279), reprinted in International Legal Materials, vol. XIII (1974), p. 591. Similar provisions may be found in article 2, para. 6 of the ECE Convention on environmental impact assessment in a transboundary context, done at Espoo on 25 February 1991 (document E/ECE/1250); the Guidelines on responsibility and liability regarding transboundary water pollution, part II.B.8, prepared by the ECE Task Force on responsibility and liability regarding transboundary water pollution (document ENVWA/R.45, 20 November 1990); and the Draft ECE Charter on environmental rights and obligations, para. 6, prepared at a meeting of experts on environmental law, 25 February-1 March 1991 (document ENVWA/R.38, annex I).

that afforded in the country of origin in cases of domestic pollution and in comparable circumstances, to persons of equivalent condition or status ... ." 336/

Article 33

Settlement of disputes

In the absence of an applicable agreement between the watercourse States concerned, any watercourse dispute concerning a question of fact or the interpretation or application of the present articles shall be settled in accordance with the following provisions:

(a) If such a dispute arises, the States concerned shall expeditiously enter into consultations and negotiations with a view to arriving at equitable solutions of the dispute, making use, as appropriate, of any joint watercourse institutions that may have been established by them.

(b) If the States concerned have not arrived at a settlement of the disputes through consultations and negotiations, at any time after six months from the date of the request for consultations and negotiations, they shall at the request of any of them have recourse to impartial fact-finding or, if agreed upon by the States concerned, mediation or conciliation.

(i) Unless otherwise agreed, a Fact-Finding Commission shall be established, composed of one member nominated by each State concerned and in addition a member not having the nationality of any of the States concerned chosen by the nominated members who shall serve as Chairman.

(ii) If the members nominated by States are unable to agree on a Chairman within four months of the request for the establishment of the Commission, any State concerned may request the Secretary-General of the United Nations to appoint the Chairman. If one of the States fails to nominate a member within four months of the initial request pursuant to paragraph (b), any other State concerned may request the Secretary-General of the United Nations to appoint a person who shall not have the nationality of any of the States concerned, who shall constitute a single member Commission.

336/ OECD document C(77)28 (Final), annex, in OECD, OECD and the Environment (1986), p. 150. To the same effect is principle 14 of the Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States, approved in decision 6/14 of the Governing Council of the United Nations Environment Programme (UNEP) of 19 May 1978. A discussion of the principle of equal access may be found in Van Hoogstraten, Dupuy and Smets, "Equal Right of Access: Transfrontier Pollution", Environmental Policy and Law, vol. 2 (1976), p. 77.

(iii) The Commission shall determine its own procedure.

(iv) The States concerned have the obligation to provide the Commission with such information as it may require and, on request, to permit the Commission to have access to their respective territory and to inspect any facilities, plant, equipment, construction or natural feature relevant for the purpose of its inquiry.

(v) The Commission shall adopt its report by a majority vote, unless it is a single member Commission, and shall submit that report to the States concerned setting forth its findings and the reasons therefor and such recommendations as it deems appropriate.

(vi) The expenses of the Commission shall be borne equally by the States concerned.

(c) If, after twelve months from the initial request for fact-finding, mediation or conciliation or, if a fact-finding, mediation or conciliation commission has been established, six months after receipt of a report from the Commission, whichever is the later, the States concerned have been unable to settle the dispute, they may by agreement submit the dispute to arbitration or judicial settlement.

Commentary

(1) Article 33 provides a basic rule for the settlement of watercourse disputes. The rule is residual in nature and applies where the watercourse States concerned do not have an applicable agreement for the settlement of such disputes.

(2) Subparagraph (a) obliges watercourse States to enter into consultations and negotiations in the event of a dispute arising concerning a question of fact or the interpretation or application of the present articles. In carrying out such consultations and negotiations, the watercourse States concerned encouraged to utilize any existing joint watercourse institutions established by them. The words "as appropriate" were used to denote the fact that in conducting consultations and negotiations, the watercourse States concerned remain free to decide whether or not to utilize such joint watercourse institutions.

(3) The consultations and negotiations should be conducted in good faith and in a meaningful way that could lead to an equitable solution of the dispute. The principle that parties to a dispute should conduct their negotiations in good faith and in a meaningful way is a well-established rule of international law. The International Court of Justice, in the North Sea Continental Shelf case between Denmark and the Federal Republic of Germany, stated with regard

to this principle that the parties to a dispute "are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it". 337/

(4) Subparagraph (b) sets forth the right of any watercourse State concerned to request the establishment of a Fact-Finding Commission. The purpose of this provision is to facilitate the resolution of the dispute through the objective knowledge of the facts. The information to be gathered is intended to permit the States concerned to resolve the dispute in an amicable and expeditious manner and to prevent the dispute from escalating. (Indeed, it is envisaged that the availability to watercourse States of fact-finding machinery will often prevent disputes from arising by eliminating any questions as to the nature of the relevant facts). Fact-finding as a means of conflict resolution has received considerable attention by States. For example, the General Assembly of the United Nations has adopted a Declaration on Fact-Finding in the Field of the Maintenance of International Peace and Security 338/ in which it defines fact-finding to mean "acquiring detailed knowledge about the factual circumstances of any dispute or situation, the continuation of which might threaten the maintenance of international peace and security ...". The request for fact-finding may be made by any of the parties to the dispute at any time after six months from the commencement of the consultations and negotiations. The rule also provides for the watercourse States concerned to have recourse to mediation or conciliation at the request of any of them and, upon the agreement of the other parties to the dispute. All the parties to the dispute must give their consent before recourse to mediation or conciliation can be made.

(5) Subparagraphs (i) to (vi) provide for the constitution and functioning of the Fact-Finding Commission requested pursuant to paragraph 1 (b). The provisions state that unless the parties have agreed otherwise, 339/ the fact-finding shall be conducted by a Fact-Finding Commission established in accordance with paragraph 1, subparagraph (b) of this article.

337/ I.C.J. Reports 1969, p. 3.

338/ Annexed to General Assembly resolution 46/59.

339/ They are free for example to establish a single member Commission or otherwise vary any aspect of the arrangement, including the size of the Commission.

(6) Subparagraph (ii) gives the nominated members a period of four months after the establishment of the Commission to agree on a chairman. If they fail to agree on a chairman, any party to the dispute may request the Secretary-General of the United Nations to appoint the chairman. The rule also provides for any of the parties to the dispute to request the Secretary-General of the United Nations to appoint a single member Commission if any of the parties fails, within four months, to nominate a member. The person to be appointed may not be a national of any of the States concerned. These provisions are intended to avoid the dispute settlement mechanism being frustrated by the lack of cooperation of one of the parties.

(7) Subparagraph (iii) provides that the Fact-Finding Commission should determine its own procedure.

(8) Subparagraph (iv) obliges all the watercourse States concerned to provide the Commission with the information that it may require. This requirement is based on similar provisions which have been fairly common since the elaboration of the Bryan Treaties. 340/ The watercourse States concerned are also obligated to provide the Commission access to their respective territories, in order to inspect any facilities, equipment, construction or natural feature which may be relevant for the purpose of its inquiry.

(9) In accordance with subparagraph (v), the Commission is required to adopt its report by a majority vote. Where a Commission is composed of a single member the report is that of the single member. The Commission is required to submit its report to the States concerned and should set forth its findings and give reasons thereof. It may also provide recommendations, if it deems it appropriate to do so.

(10) The rule provided in subparagraph (vi) requires the expenses of the Commission to be borne equally by the watercourse States concerned. The parties may of course agree on a different arrangement.

(11) Subparagraph (c) sets out a rule for the submission of the dispute to arbitration or judicial settlement. In the event that there are more than two watercourse States parties to a dispute and some but not all of those States have agreed to submit the dispute to a tribunal or the International Court of Justice, it is to be understood that the rights of the other watercourse

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340/ G.H. Hackworth, Digest of International Law vol. VI (1943), p. 5.

States who have not agreed to the referral of the dispute to the tribunal or the International Court of Justice cannot be affected by the decision of that tribunal or the International Court of Justice.

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RESOLUTION ON CONFINED TRANSBOUNDARY GROUNDWATER

The International Law Commission,

Having completed its consideration of the topic "The law of the non-navigational uses of international watercourses",

Having considered in that context groundwater which is related to an international watercourse,

Recognizing that confined groundwater, that is groundwater not related to an international watercourse, is also a natural resource of vital importance for sustaining life, health and the integrity of ecosystems,

Recognizing also the need for continuing efforts to elaborate rules pertaining to confined transboundary groundwater,

Considering its view that the principles contained in its draft articles on the law of the non-navigational uses of international watercourses may be applied to transboundary confined groundwater,

1. Commends States to be guided by the principles contained in the draft articles on the law of the non-navigational uses of international watercourses, where appropriate, in regulating transboundary groundwater;

2. Recommends States to consider entering into agreements with the other State or States in which the confined transboundary groundwater is located;

3. Recommends also that, in the event of any dispute involving transboundary confined groundwater, the States concerned should consider resolving such dispute in accordance with the provisions contained in article 33 of the draft articles, or in such other manner as may be agreed upon.

CHAPTER IV

STATE RESPONSIBILITY

A. Introduction

223. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic: "State responsibility" envisaged the structure of the draft articles as follows: Part One would concern the origin of international responsibility; Part Two would concern the content, forms and degrees of international responsibility; and a possible Part Three, which the Commission might decide to include, could concern the question of the settlement of disputes and the implementation (mis en oeuvre) of international responsibility. 341/

224. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading Part One of the draft articles, concerning "the origin of international responsibility". 342/

225. The Commission, at its thirty-second session, also began the consideration of Part Two of the draft articles, on "the content, forms and degrees of international responsibility".

226. The Commission, from its thirty-second (1980) to its thirty-eighth sessions (1986), received seven reports from the previous Special Rapporteur, Mr. Willem Riphagen, 343/ with reference to Parts Two and Three of the draft articles. From that time on, the Commission assumed that a Part Three on the settlement of disputes and the implementation (mise en oeuvre) of international responsibility would be included in the draft articles.

341/ Yearbook ... 1975, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

342/ Yearbook ... 1980, vol. II (Part Two), pp. 26-63, document A/35/10, chap. III.

343/ For the seven reports of the Special Rapporteur, see
Yearbook ... 1980, vol. II (Part One), p. 107, document A/CN.4/330;
Yearbook ... 1981, vol. II (Part One), p. 79, document A/CN.4/334;
Yearbook ... 1982, vol. II (Part One), p. 22, document A/CN.4/354;
Yearbook ... 1983, vol. II (Part One), p. 3, document A/CN.4/366; and Add.1;
Yearbook ... 1984, vol. II (Part One), p. 1, document A/CN.4/380;
Yearbook ... 1985, vol. II (Part One), p. 3, document A/CN.4/389; and
Yearbook ... 1986, vol. II (Part One), p. 1, document A/CN.4/397; and Add.1.

227. The Commission, from its fortieth (1988) to forty-fifth (1993) sessions, received five reports 344/ from the current Special Rapporteur 345/, Mr. Gaetano Arangio-Ruiz.

228. At the conclusion of its forty-fifth session, the Commission had provisionally adopted for inclusion in Part Two of the draft articles, articles 1 to 5, 346/ and articles 6 (Cessation of wrongful conduct), 6 *bis* (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction) and 10 *bis* (Guarantees of non-repetition). 347/ It had furthermore received from the Drafting Committee draft articles 11 (Countermeasures by an injured State), 12 (Conditions relating to resort to countermeasures), 13 (Proportionality) and 14 (Prohibited countermeasures) as adopted on first reading by the Committee. 348/ Finally, it had referred to the Drafting Committee draft articles 1 to 6 of Part Three (and an Annex thereto) concerning dispute settlement procedures, 349/ which are

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344/ For the five reports of the Special Rapporteur, see *Yearbook ... 1986*, vol. II, Part One, p. 6, document A/CN.4/416 and Add.1; *Yearbook ... 1990*, vol. II, Part One, document A/CN.4/425 and Add.1; *Yearbook ... 1991*, vol. II, Part One, document A/CN.4/440 and Add.1; document A/CN.444 and Add.1-3; and document A/CN.4/L.453 and Add.1 and Corr.1, 2 and 3 and Add.2 and 3.

345/ The current Special Rapporteur was appointed at the thirty-ninth session in 1987.

346/ For the text of articles 1 to 5 (para. 1), with commentaries, see *Yearbook ... 1985*, vol. II, Part Two, pp. 24 et seq.

347/ For the text of article 5, paragraph 2 and articles 6, 6 *bis*, 7, 8, 10 and 10 *bis*, with commentaries, see *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10* (A/48/10), pp. 132 et seq.

348/ See document A/CN.4/L.480 and Corr.1 (French only) and Add.1.

The provisions in question were introduced by the Chairman of the Drafting Committee at the 2318th meeting of the Commission but action thereon was deferred to the next session, in line with the Commission's policy of not adopting articles not accompanied by commentaries.

349/ For the text of draft articles 1 to 6 of Part Three and the Annex thereto submitted by the current Special Rapporteur, see *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10* (A/48/10), pp. 102 et seq., notes 74, 75, 76, 77, 78 and 79.

currently pending before the Drafting Committee, together with the proposals of the previous Special Rapporteur on the same subject. [350]

B. Consideration of the topic at the present session

229. At the present session, the Commission had before it Chapter II of the fifth report of the Special Rapporteur (A/CN.4/453/Add.2 and 3) and his sixth report (A/CN.4/461 and Add.1 and 2). The reports dealt on the one hand with the question of the consequences of acts characterized as crimes under article 19 of Part One of the draft articles and on the other hand with an appraisal of the pre-countermeasures dispute settlement provisions so far envisaged for the draft articles. The present section has been organized accordingly.

1. The question of the consequences of acts characterized as crimes under article 19 of Part One of the draft articles

230. The Commission had before it Chapter II of the Special Rapporteur's fifth report (A/CN.4/453/Add.2 and 3), which had been introduced at the previous session, [351] and Chapter III of his sixth report (A/CN.4/461/Add.1). It considered those documents at its 2339th to 2343rd and 2348th meeting held between 17 May and 15 June 1994.

231. After completing its consideration of the above documents, the Commission heard the conclusions of the Special Rapporteur, for which it thanked him. [352] It took note of his intention to present at the next session articles or paragraphs on the matter under discussion to be included in Parts Two and Three. It also noted that the Special Rapporteur intended to proceed in such a way as to enable the Commission to conclude the first reading of the draft by the end of the current term of office of its members.

232. The comments and observations of members of the Commission on the question of the consequences of acts characterized as crimes under article 19 of Part One of the draft are reflected in paragraphs 233 to 324 below.

233. Many members emphasized the complexity of the problems at stake which, it was observed, called for a reflection on the sensitive and crucial notions of

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[350] For the text of draft articles 1 to 5 of Part Three and the Annex thereto as submitted by the previous Special Rapporteur, see Yearbook ... 1986, vol. II, Part Two, p. 35, note 86. Those provisions were referred to the Drafting Committee at the thirty-eighth (1986) session.

[351] See Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10), paras. 283 to 333.

[352] See paras. 326 to 343 below.

international community, inter-State systems, fault and criminal responsibility of States, as well as on the functions and powers of United Nations organs. Appreciation was expressed to the Special Rapporteur for his learned and valuable contribution to the study of those problems despite what was termed the relative prudence of his proposals. Chapter III of his sixth report, in which the different issues raised by the distinction between crimes and delicts were presented in the form of a questionnaire, was viewed as particularly useful and as setting a precedent that ought to be repeated.

(a) The distinction between crimes and delicts as embodied in article 19 of Part One of the draft articles

(i) The concept of crime

234. According to one body of opinion, the concept of crime posed no conceptual difficulties and the distinction between crimes and delicts reflected a qualitative difference between basic infringements of the international public order and ordinary delicts which did not threaten the fundamental premise upon which international society was based, namely the coexistence of sovereign States: that difference was, it was said, a basic fact of international life inasmuch as a breach of an air transport agreement and aggression, or the violation by police officials of the human rights of a foreigner and an act of genocide, were manifestly incommensurate. The remark was also made that the difference between the two categories of internationally wrongful acts had been recognized in article 19, which had been drafted with great care and adopted unopposed by the Commission in 1976 after lengthy discussion, and that it would be inadvisable to question it further.

235. Another body of opinion queried the existence of such a thing as a category of State crimes. The remark was made that the many internationally wrongful acts which could be attributed to a State varied in magnitude depending on the subject matter of the obligation breached, the significance the international community attached to the obligation, the bilateral or other scope of the obligation and the circumstances in which the breach of the obligation occurred and that where the wrongful act involved injury to person or damage to property on a scale large enough to bestir the conscience of humanity, the use of the word "crime" was usual in day to day parlance as well as in other political and other legal contexts. Against this background, a clear-cut distinction between crimes and delicts was viewed as questionable.

The proposed distinction between categories of internationally wrongful acts was also considered as irrelevant to the extent that it did not appear to find reflection in their respective consequences.

236. Some members observed that while it was possible to argue in favour of a continuum within a single regime of responsibility extending from minor breaches at one end of the spectrum to exceptionally serious breaches at the other end, a continuum marked by an essentially quantitative difference, the debate between the proponents of the continuum theory and those who wished the draft to include a distinct category for exceptionally serious wrongful acts was likely to be never-ending, since quantitative differences could, beyond a certain threshold, turn into qualitative ones.

(ii) The question of the legal and political basis of the concept of crime

237. According to one body of opinion, the concept of crime was rooted in positive law and in the realities of international life. The concept was viewed as having a self-evident political foundation since contemporary history was full of examples of crimes directly or indirectly imputable to the State. It was furthermore described as falling within lex lata inasmuch as some acts, such as genocide and aggression, were regarded by the international community as a whole as violating its fundamental rights or, in the case of genocide or apartheid, were characterized as criminal in international conventions. It was also said that, in general terms, the components of an international crime emerged from jurisprudence, the practice of States and the rulings of international tribunals. Reference was made in this context to the work of the Nürnberg and Tokyo Tribunals and to the judgment of the International Court of Justice in the Barcelona Traction case. 353/ With reference to that judgment, attention was drawn to the difference between a crime and a violation of an obligation erga omnes: it was pointed out that the Court had not confined itself to speaking of obligations erga omnes, but had emphasized "the importance of the rights involved", thereby signifying that it had in mind particularly serious violations (the examples given being aggression, genocide, and the infringement of the basic rights of the human person) and not ordinary delicts as would be, for example, the infringement of the right of transit passage through an international strait, although they, too, placed an erga omnes obligation on the coastal State. Some members,

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353/ Barcelona Traction, Light and Power Company, Limited, judgment, I.C.J. Reports 1970, p. 32.

while being of the view that the concept of State crime did not exist in lex lata, expressed readiness, albeit not without certain reservations, to acknowledge that certain acts which could be committed only by States should be characterized as crimes. A note of caution was however struck in this respect, on the ground that if the Commission ventured into the area of lex ferenda, it would be opening a Pandora's box of options that would be difficult to circumscribe.

238. According to another body of opinion, the concept of crime was not lex lata because there was no instrument making it an obligation for States to accept it. The arguments in favour of the concept derived from the jus cogens provisions of the Vienna Convention on the Law of the Treaties were viewed as unconvincing: first, because the fact that a contract or a treaty concluded contra bonos mores or jus cogens was unenforceable or void ab initio did not necessarily mean that the act or instrument was characterized as criminal; and secondly, because the inclusion of the notion of jus cogens in the 1969 Convention had been conditional on acceptance of the jurisdiction of the International Court of Justice. Equally unconvincing were, it was stated, the arguments derived from the Court's advisory opinion on the Reservations to the Genocide Convention 354/ (which merely suggested that certain provisions of the Convention had become an integral part of international law) or from the Barcelona Traction case, bearing in mind that recognition of the concept of violation erga omnes was not tantamount to recognizing the existence of a new, qualitatively different, category of acts contra legem or to questioning the distinction between civil responsibility and criminal responsibility. The remark was also made that no issue of criminal responsibility of States arose in the documents relating to the capitulation of Germany and Japan or in the 1977 Protocols to the Geneva Conventions. Further arguments included (1) the observation that a number of States had expressly rejected the concept of crime as devoid of basis in the lex lata so that the introduction of the proposed distinction might tend to detract from, rather than enhance, the possibility of the widest possible acceptance of the draft; and (2) the remark that the creation de lege ferenda of categories of violations of different kinds would undermine the effectiveness of the concept of violation erga omnes.

354/ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23.

(iii) The type of responsibility entailed by breaches characterized as crimes in article 19 of Part One of the draft articles

239. The question whether a State could incur criminal responsibility gave rise to different views.

240. According to some members, the criminalization of States should be abandoned, since a State could not be placed on the same footing as its Government or the handful of persons who, at a given moment, might be in charge of its affairs. For those members, crimes were committed by individuals who used the State's territory and resources to commit international delinquencies for their own criminal purposes. Attention was drawn in this context to the *mens rea* requirement - a requirement which, it was stated, should be distinguished from the procedure for the attribution of responsibility, namely, the legal fiction whereby, for purposes of ensuring adequate compensation for damage caused, a superior was not permitted to escape responsibility for compensation; it was not possible to attribute the *mens rea* of one individual to another, still less of one individual to a legal entity such as a State. Reference was furthermore made to the maxim "*societas delinquere non potest*" according to which a State, including its people as a whole, could not be a subject of criminal law and the view was expressed that, under criminal law principles, it was questionable whether an administrative organ, as a legal person, could be so regarded. It was pointed out, in this connection, that many positive laws made no provision concerning the guilt of legal persons or for corresponding penalties. Further comments included (1) the remark that the requirements of the maxim *nullum crimen nulla poena sine lege* (namely, first, the existence of definitive norms and objective criteria for determining whether a delict amounted to a crime and, second, penalties having the characteristics of punishment under criminal law) were not met at the present stage and (2) the observation that if the concept of State crime were to be accepted, the position of the State would be undermined - a result which a realistically-minded international community would find difficult to accept.

241. The attribution of a criminal responsibility to a State was furthermore viewed as inconceivable in the absence of a legal organ to try and punish States. It was pointed out in this connection that the jurisdiction of the International Court of Justice - the only permanent judicial organ for the

settlement of disputes in the international community - was based on voluntary acceptance and that the Security Council had mainly policing powers which were in no way those of a court of justice.

242. Concern was also expressed that the attribution of a criminal responsibility to a State cast the shadow of criminality over the entire people of a State and result in collective punishment. 355/

243. In the view of other members, the idea of State responsibility for crimes posed no conceptual difficulties: it was perfectly possible to envisage a concept equivalent to mens rea in the case of acts imputable to States. The remark was made in this context that, while criminal responsibility was primarily individual, as a result of advances in the law it could also be collective and that recognition of the criminal responsibility of a legal person in certain conditions and circumstances was more a step forward for the law than a step backward, as evidenced by recent developments in the legal systems of certain countries. It was remarked in this connection that the maxim societas delinquere non potest had fewer and fewer supporters, particularly in view of economic and financial crimes such as money laundering; in such a case, the most serious criminal conduct of States called for an appropriate policy of sanctions, the nature of which, albeit punitive, could not be afflictive, as in the case of individuals guilty of crimes. Attention was drawn in this respect to the political measures (enumerated in paragraph 289 below) of which a State author of a crime might be the object.

244. It was also said that, today, a State could cause such damage to the international community as a whole that a society should not be allowed to shift the responsibility for crimes committed in its name onto mere individuals, and that the concept of State crime should therefore be accepted, even if the collective sanctions against the State in question to which that crime might lead could well be prejudicial to its entire population and not only its leaders. 356/ History, it was added, provided examples of criminal States and there was no reason not to say it loud and clear.

245. Still other members, while agreeing that the question of the criminal responsibility of the State was extremely delicate and raised in particular the problem of collective responsibility, were of the opinion that the

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355/ Views on this issue are reflected in more detail in the subsection devoted to the consequences of crimes (see paras. 289 to 295 below).

356/ Id.

divergence of views reflected above was irrelevant in the present context. They recalled in this connection that the Commission had not sought in 1976 to establish the criminal responsibility of the State and that the use of the term "crime" in no way prejudged the question of the content of responsibility for an international crime. The remark was made in this context that State responsibility in international law was neither criminal nor civil: it was very simply, international, different and specific. Its specificity was revealed, for instance, in the fact that some internationally wrongful acts, instead of entailing the responsibility of the State alone, also entailed the individual responsibility of their perpetrators, who could not hide behind the immunities conferred on them by their functions.

(iv) The need for the concept of crime - Possible alternative approaches

246. According to one body of opinion, the concept of crime had a fundamental use, that of freeing the rules on State responsibility from the strait-jacket of bilateralism and, in the case of particularly serious acts, enabling the international community, acting either within the framework of institutions or through individual States, to intervene in order to defend the rights and interests of both the victim State and the international community. The remark was made in this connection that, in the case of an international crime, the victim was the community of States as a distinct legal entity and that the concept of international crime helped to promote the international community to the status of, as it were, a quasi-public legal authority.

247. According to another body of opinion, the crime-delict distinction was neither necessary nor appropriate in the draft articles on State responsibility, the purpose of which was not to punish States but to require them to compensate for damage caused. The remark was made that, if it was deemed necessary to free the international community from the yoke of bilateralism, the concept of international crime was neither necessary nor sufficient: it was not necessary because there was no justification for going so far as the idea of punishment inevitably connected with the idea of a crime and it was not sufficient because it failed to settle the issue of the category of erga omnes violations as a whole. It was also stated that the concerns underlying the concept of State crime had lost much of their relevance since 1976 with the end of the cold war, the slackening of North-South tensions and the retreat of apartheid and colonialism.

248. Some members queried the need to use any descriptive term at all to meet the concerns underlying article 19. Thus the remark was made that

distinguishing between degrees of gravity meant making a distinction on the basis of fault - a concept which, it was said, should not have been abandoned in the case of delicts and had a fundamental role to play in the case of crimes.

249. Another approach which was advocated was to introduce the concept of *jus cogens* obligations into the draft and to distinguish a breach of a *jus cogens* obligation from other lesser international wrongful acts - an approach which would merely require (a) to follow closely the language of the *jus cogens* provision in article 53 of the Vienna Convention on the Law of Treaties (without using any accompanying descriptive term and without introducing any illustrative list of examples for which there might not be adequate *lex lata* support) and (b) to indicate what remedies a breach of a *jus cogens* type of obligation would entail, in addition to those required for other wrongful acts. Some members, while recognizing that this was a tempting approach, pointed out that, whereas all crimes were violations of rules of *jus cogens*, the contrary did not hold: *pacta sunt servanda*, it was stated, could be viewed as a *jus cogens* norm, but not all violations of *pacta sunt servanda* were crimes.

250. A further possibility was, in the view of some members, to elaborate the consequences of breaches of *erga omnes* obligations and thereby free the draft articles from the yoke of bilateralism. Doubts were however expressed on this approach on the ground that not all *erga omnes* obligations were so essential to the international community that their violation could be treated systematically as a crime.

251. Attention was finally drawn to the possibility of dealing with the issue from the standpoint of State responsibility for international delinquencies on the one hand and of the criminal responsibility of individuals for crimes on the other. Reference was made in this context to article 5 of the draft Code of Crimes against the Peace and Security of Mankind as adopted on first reading, which provided that prosecution of an individual for a crime against the peace and security of mankind did not relieve a State of any responsibility under international law for an act or omission attributable to it.

(v) The definition contained in article 19 of Part One of the draft articles

252. Some members found the article unsatisfactory. It was said in particular that the text was too general and did not propose a real definition of crimes;

that it stressed the degree of gravity of the act which was characterized as a crime but did not define the threshold of gravity at which a delict became a crime; that it spoke of an obligation that was essential without defining those terms; and that it took no account of wilful intent or of the concept of fault, even though that concept, it was stated, was inseparable from the concept of crime. Concern was also expressed that, as it now stood and bearing in mind its history, article 19 implied that a State had to continue to suffer the legal consequences of an international crime committed earlier even if the political, social or human circumstances in which that international crime had been committed had ceased to exist.

253. Other members felt that the current wording adequately expressed the underlying intention which was to make it clear that most breaches could be dealt with in the bilateral relationship between the two States directly involved, while others were of such gravity that they affected the entire international community. In their opinion, the article had rightly been drafted in general terms. The remark was made in this connection that the draft articles were dedicated exclusively to secondary rules, with the result that the principle nullum crimen sine lege did not apply in the present context and that the definition of the various crimes was to be left to other instruments. It was also pointed out that the concept of international crime was evolutive and that a flexible formulation adaptable to possible enlargements of the category of crimes was desirable; reference was made in this context to the formula defining the competence of the Security Council. While some of the members in question found merit in the current structure of article 19 (a general clause and a non-exhaustive list), others felt that the list of examples should be transferred to the commentary.

254. As regards paragraph 2, some members said that it correctly reflected the three main criteria to be applied in defining a crime, namely (1) a breach involving fundamental interests of the international community and therefore going beyond the framework of bilateral relations; (2) a breach which was serious in both quantitative and qualitative terms; and (3) recognition by the international community that the breach was a crime, which recognition must be inferred from experience and practice. With reference to the argument that the formulation was tautological, it was pointed out that the same remark could be made about the definition of jus cogens or the universally accepted definition of custom (i.e. a general practice accepted as law). Along the same lines, the remark was made that the subjective criterion which derived

from the fact that the violation was "recognized" as a crime was no more open to question than the criterion of recognition by civilized nations of the general principles as referred to in Article 38 of the Statute of the International Court of Justice, and that the concept of crimes "recognized" by the international community as a whole was spelt out in the enumeration given in paragraph 3.

255. Other members pointed out that the elaborate language of paragraph 2, which stemmed in large part from the terminology of the compromise _jus cogens_ provisions of article 53 of the Vienna Convention on the Law of Treaties was rather circuitous. With reference to the requirement that the breach be recognized as a crime by the international community, the remark was made that criminal law was steeped in subjectivity: the reprobation aroused in the public conscience by the commission of an act, no matter how heinous, was never uniform, even in a national society sharing the same values, and in a culturally heterogeneous international society, the element of subjectivity was even more marked. Thus, it was stated, the question might be asked, if only from a moral point of view, why a "small aggression" which caused relatively minor destruction of property and the death of few innocent people should entail additional consequences in terms of authorized armed countermeasures when such countermeasures would presumably not be allowed in the case of a wide-scale genocide.

256. As regards _paragraph 3_, some members took the view that the list contained therein was still satisfactory, subject to a review of paragraph 3 (d), which was described as controversial, and subject to some drafting changes in paragraph 3 (b) to bring the text into line with the reality of modern international relations, especially after the end of colonialism. On the former point, the remark was made that the case contemplated in subparagraph (d) was somewhat unrealistic, as it was difficult to believe that pollution of the atmosphere or the seas could extend to mankind as a whole without any measure being taken, if only at the regional level; furthermore, it was added, defining pollution of the atmosphere or of the seas as a crime was somewhat premature, considering that acts of transboundary pollution were only just beginning to be regarded as internationally wrongful acts. While some of the members in question invited the Commission to resist attempts at expanding the list of crimes, there was also a view that crimes related to drug trafficking should be included therein.

257. Paragraph 3 was considered by other members as defective in a number of ways. It was in particular viewed as encroaching on the distinction between primary and secondary rules, as reflecting a questionable legal technique since it gave examples which really belonged in the commentary and as likely to quickly become outdated since the list it contained was subject to the changing views of times. Reference was made in this context to paragraph 3 (b). A further remark was that the text did not actually say what it appeared to say: it appeared to say that the matters listed and examples given actually constituted State crimes; since, however, it was prefaced by the phrase "Subject to paragraph 2, and on the basis of the rules of international law in force", the test provided for in paragraph 2 still had to be applied and the rules of international law in force still had to be determined. Attention was also drawn to the difficulty involved in establishing a non-exhaustive list which none the less set out a number of categories.

258. Some members observed that the term "crime" might be an unnecessary source of difficulties because of its penal law connotations which caused concern as to how the concept would be applied. Suggestions were made to replace it by phrases such as "violation of an extreme gravity", "internationally wrongful act of a particular gravity", "very serious international delict" or "internationally wrongful act of an extreme gravity".

259. While not pressing for the term "crime" to be maintained at any price, some members expressed doubts on the suggested terminological changes. It was pointed out that the term "crime" had the psychological advantage of stressing the exceptional seriousness of the breach concerned and might have a deterrent effect on the conduct of States. The remark was also made that the word had a tradition since it had been used for example in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and had been preferred over the term "offences" in the draft Code of Crimes against the Peace and Security of Mankind. While it was recognized that the point at issue in the draft Code was the criminal responsibility of individuals, not States, emphasis was placed on the fact that conduct which would be labelled criminal under the Code corresponded closely, ratione materiae, to breaches of obligations in the present draft which had been termed international crimes. Doubts were therefore expressed on the advisability of replacing the term "international crimes" by the more serpentine and more obscure term "exceptionally serious wrongful acts", or variants thereof.

260. Several members remarked that a terminological change would not bridge the gap between those for whom internationally wrongful acts were part of a continuum and those for whom the crime-delict distinction was intended to convey a difference of species.

(b) Issues raised and questions posed by the Special Rapporteur in his fifth and sixth reports as relevant to the elaboration of a regime of State responsibility for crimes

(i) Who determines that a crime has been committed?

261. Some members expressed the view that the question who would be responsible for determining that a crime had been committed was of fundamental importance in instituting a regime of international responsibility for crimes. The Commission, it was stated, faced a virtually insuperable difficulty in that a body with responsibility for determining whether, on the facts, a State had indeed committed a crime would be central to such a regime.

262. Other members pointed out that the problem, however serious also arose in the case of ordinary delicts - something which had not prevented the Commission from elaborating a regime of responsibility for delicts. The remark was also made that the question of who determined that a crime had been committed was irrelevant in the context of Part Two of the draft and fell solely in Part Three.

263. Some members observed that, in dealing with this question, one could not ignore the present imperfect state of international society. While it was recognized that alongside the "relational society", based on coordination between entities that were legally equal, a more progressive constitution of the international community had evolved, and while emphasis was placed on the positive role played by the General Assembly, the Security Council and the International Court of Justice, the present organization of the international community was viewed as providing no alternative but to leave it to each State to determine whether a crime had been committed. While this state of affairs was considered by the members in question as far from ideal, some among them drew attention to the existence of safety nets. It was pointed out in particular that any State which decided that an international crime had been committed did so at its own risk and that such a decision could always be challenged by the accused party.

264. Other members found it difficult to accept, except in the case of self-defence, 357/ that it should be left to each State, including the victim State, to determine whether a crime had been committed, bearing in mind the nemo judex principle. They deemed it indispensable that this prerogative should be reserved for an international judicial body, impartial and independent. It was suggested that this fundamental principle be included in one form or another in the draft articles. It was also proposed that a system should be devised whereby the existence of a crime would be determined by a body representing the international community, which might for example be the group of States parties to the future convention on State responsibility.

265. This approach was viewed as unrealistic by some members, who warned the Commission not to be tempted into undertaking the task of paramount political importance of defining a new layer of worldwide institutions responsible for issues of State responsibility. Doubts were expressed on the possibility of establishing in a foreseeable future a judicial body with widely accepted jurisdiction to which cases would be uniformly referred and which would make its determination on the basis of a consistent body of jurisprudence.

266. The role of United Nations organs in this area is discussed in paragraphs 296 to 314 below.

(ii) The possible consequences of a determination of a crime

267. Some members queried the wording of the question posed by the Special Rapporteur and pointed out that in the framework of Part Two of the draft articles the matter was not to determine the possible consequences of a determination of crime but those of the commission of a crime.

a. Substantive consequences

268. According to a substantive number of members, the distinction between delicts and crimes had a qualitative impact on the substantive consequences of the two categories of internationally wrongful acts inasmuch as the latter entailed a violation of a norm essential for the protection of fundamental interests of the international community. There was however also a view to the contrary (see para. 270 below).

357/ Emphasis was placed in this context on the need to clarify the concept of self-defence through substantive, formal and procedural rules to be determined in the light of the resolutions of the United Nations, the Charter and the entire set of customary and conventional rules.

269. As regards remedies available to the State victim of a crime, no difference between delicts and crimes was identified as far as cessation is concerned.

270. On reparation lato sensu, positions differed. According to one view, the crime/delict distinction was irrelevant and the examples to the contrary given by the Special Rapporteur were unconvincing as they involved either cessation, or guarantees of non-repetition, or the exercise by the Security Council of its responsibility in the maintenance of international peace and security or, in the case of territorial amputations, a violation of the norms of contemporary international law on territorial integrity, self-determination and human rights; the crime/delict distinction was also described as irrelevant as regards the ban on demands that would impair the dignity of the State concerned because there could be no greater infringement of the dignity of the State than that of the conviction and punishment of its leaders, already envisaged in article 10. According to a substantial number of members, however, the substantive consequences of crimes as far as reparation and satisfaction was concerned were qualitatively different from those of delicts.

271. With respect to restitution in kind, several members expressed the view that crimes should be excluded from the sphere of application of the restrictions contemplated in article 7 (c) and (d) because they were harmful to the international community as a whole and infringed a peremptory norm of international law. Some members on the other hand pointed out that the limitation of excessive onerousness should not be derogated from if the population of the criminal State was to be spared excessive suffering. The remark was further made that the choice between restitution in kind and compensation should not be available to the State victim of a crime unless restitution in kind was materially impossible or entailed a violation of jus cogens.

272. With respect to satisfaction comments focused on (1) trial of the responsible individuals, (2) demands which would impair the dignity of the State concerned and (3) punitive damages. Concerning the first aspect, the view was expressed that in the case of crimes, prosecution should be possible, contrary to the provisions of article 10, paragraph 2 in regard to delicts, without the consent of the author State. As for the ban on demands which would impair the dignity of the State concerned, the remark was made that it should not apply in the case of crimes since a State, in committing a crime,

chose to humiliate itself and consequently need not be spared further humiliation. Punitive damages were viewed by some of the members who addressed the issue as a necessary element of any regime of reparation for crimes. Attention was however drawn to the significant problems which punitive damages posed, especially when the principal victim of the State crime was the population.

273. As regards claimants, reference was made to the eventuality of a plurality of injured States: such a situation, it was stated, called for coordination in the submission of claims and might require ad hoc procedures for the submission and consideration of claims.

274. Some members furthermore took the view that in the case of crimes, reparation was due not only to the State which was materially affected, but also, in a broader sense, to the international community. In this connection the remark was made that since there was still no organized international community, it was imperative that States should have the right to reparation not uti singuli but within the framework of some form of coordination between the States parties to the future instrument on responsibility. As to the suggestion that the General Assembly or the Security Council could seek a remedy on behalf of States, it was viewed as alien to the regime of the Charter. While the possibility of the General Assembly or Security Council seeking an advisory opinion was envisaged, the remark was made that in that case it would no longer be a question of a judicial remedy.

b. The instrumental consequences (countermeasures)

- The conditions of lawful resort to countermeasures in the case of crimes

275. Some members shared the Special Rapporteur's view that the power to resort to countermeasures should be subject to less stringent conditions in the case of crimes than in that of delicts. In particular it was considered excessive to require a State which believed it was the victim of a crime to accompany its reaction by an offer of peaceful settlement. Other members expressed a different opinion. One observation made was that, in a recent case, a number of States had adopted economic measures on their own before any attempt had been made to resolve the question by means of a dispute settlement mechanism and that, had there been no hasty condemnations and economic countermeasures, a peaceful but principled solution to the conflict might conceivably have been found.

276. The principle of proportionality was generally regarded by the members who addressed the issue as applicable to responses to crimes. According to one view, this meant that, in the area of countermeasures as in others, the crime/delict distinction was irrelevant. The remark was made that failure to apply the principle of proportionality in the case of crimes could mean that the State responsible for a crime was not treated as severely as it should be. The view was also expressed that, in addition to imposing obligations of proportionality on the injured State, corresponding obligations not to take further intensified countercountermeasures to upgrade the dispute should also be prescribed on the wrongdoing State.

277. As regards prohibited countermeasures, the members who addressed the issue generally agreed on the need to strictly abide by the prohibition of the use of force and concern was expressed that further pretexts for use of force might be added to those already invoked in the past. Emphasis was placed on the primacy of the Charter in this area. In this connection the remark was made that it was the Charter, and not the category of the crime, that would ultimately justify or invalidate forceful reaction and that, while the interpretation of the relevant Charter provisions was controversial, particularly with regard to humanitarian intervention, the category of crime involved had not been used as the decisive element whenever it had been determined that such intervention was permissible.

278. At a more general level, the view was expressed that individual reactions involving a violation of a jus cogens norm should be ruled out. The remark was made in this connection that recognition of the concept of crime did not mean recognition of an absolute and unlimited right of riposte or of lex talionis, and that the world had recently witnessed an armed intervention following on a genocide where the use of force had never been recognized as lawful by the international community because, in order to put a stop to the crime, the intervening State had in turn violated a peremptory rule of international law.

279. In this context, the view was expressed that the distinction to be drawn was not between countermeasures permissible in cases of crimes (or other jus cogens breach), on the one hand, and cases where there was no crime (or other jus cogens breach), on the other; but rather between countermeasures which were permissible under an applicable multilateral, or even bilateral, treaty regime (the Charter or otherwise) and cases where there was no applicable treaty regimes prescribing what countermeasures could be taken in

the event of a breach of an obligation or containing provisions on the peaceful settlement of disputes. Emphasis was placed on the need to provide, where no treaty regime applied, for some regulation of the countermeasures that might be taken in the case of an alleged breach by a State of a multilateral obligation.

280. As for non-forcible countermeasures, the Special Rapporteur's opinion that they might be exacerbated compared with those applicable to delictual responsibility was viewed as correct despite the relative vagueness of his conclusions on this point.

281. The question whether the power of reaction to a crime extended to individual States other than the victim State was extensively discussed. There was a view that the question was irrelevant, as was also, in this respect as in others, the crime/delict distinction inasmuch as the problem of a plurality of injured States could arise in relation to any internationally wrongful act irrespective of its seriousness. The prevailing opinion was however that the above mentioned question was a valid one, bearing in mind that a crime was, by definition, a violation of an erga omnes obligation which prejudiced the fundamental interests of the international community as a whole.

282. Some members warned that the position of "indirectly injured States" should not lightly be equated with that of the direct victim. The view was expressed in this connection that the commission of a crime did not confer on States other than the victim State the status of an injured State for the purpose of resort to countermeasures and that individual States other than the victim State could not intervene in riposte to a crime unless there was no collective reaction, lest the concept of crime led to the confirmation of existing power relationships. The power of reaction, it was said, should lie essentially with the international community. 358/ In this connection the recent trend toward elevating the concept of international community from the realm of abstraction or myth into that of lived experience and history was noted with satisfaction, as was also the growing role of non-governmental organizations in loosening the grip of the concept of national sovereignty in matters of elementary humanity.

358/ Or more modestly, as one member put it, with the community of States parties to the future convention.

283. Other members pointed out that the international community was ill-equipped to deal with international crimes of States and that at present there was no international body expressly empowered to react to all categories of international crimes, so that the reaction to a crime had to remain a matter for individual States to determine. While agreeing that the present state of affairs was far from satisfactory, some members observed that the prohibition of the use of force, the principle of peaceful settlement of disputes and the principle of proportionality provided guarantees against abuse.

284. The views expressed with regard to the possibility of creating new institutions responsible for determining whether a crime had been committed as reflected in paragraphs 264 and 265 above are also relevant in the present context.

285. Bearing in mind the lack of an institutional and procedural mechanism with competence to react to a crime on behalf of the international community, some members expressed the view that, as a substitute for truly collective action, authorization might be given in the proper form to third States not directly affected to take measures for the defence of the interests of the international community; in addition to the right to make representations, which they already enjoyed, they would have the power to take countermeasures, since the prohibition of the use of force served as a safeguard against a penalty being out of all proportion to the crime.

286. This idea was elaborated upon in relation to aggression and genocide.

287. As regards aggression, the view was expressed that, among the States not directly concerned, it was necessary to single out those that were linked to the victim State through a military alliance treaty under which any attack on one party was treated as an attack on the other. That kind of treaty raised the question of collective self-defence, of the conditions of form and substance and the instrumental circumstances in which it could be invoked under the Charter of the United Nations, and created the risk that collective self-defence might be invoked excessively so as to side-step the control of the international community or violate the rules of jus cogens. The other States, which had no legal ties with the victim State, did not of course, it was stated, have the right to invoke self-defence or use armed force in order to come to the aid of the victim; the use of armed force in that case must take place under the authority and control of the competent international bodies, in particular the Security Council. Also with reference to the

relationship between self-defence and enforcement measures ordered at the international level, the remark was made that a State's action might conceivably coincide with international measures under Chapter VII of the Charter and that such coincidence could plausibly be interpreted to indicate that the actions of the United Nations necessarily affected the obligations of States in respect of international crimes of States. Yet, it was observed, that coincidence might be more fortuitous than the result of a conviction that the United Nations represented the organized community of nations.

288. With respect to genocide, the view was expressed that all States could react to a crime of genocide even if they were not directly affected and reference was made to the distinction drawn by the International Court of Justice in the _Barcelona Traction_ case between the obligations of States towards the international community as a whole and those arising _vis-à-vis_ another State in the field of diplomatic protection. It was observed that the _actio popularis_ principle whereby all States had a legal interest in protecting the rights involved could be of significant importance. Mention was made in this connection of the case concerning the application of the 1948 Convention on Genocide brought before the Court by Bosnia and Herzegovina in March 1993. Attention was drawn in this context to the distinction to be made between the case in which a State attacked its own population and that in which the genocide was perpetrated not only against the country's own population but also against the population of other States. In answer to the question whether, in the first case, the other States should resort to countermeasures not involving the use of armed force or rely on collective mechanisms, it was said that recourse to certain countermeasures (for example, an embargo on arms supplies) was possible under the control of collective mechanisms and that the question of humanitarian intervention involving the use of armed force deserved careful consideration. In regard to the second case (genocide perpetrated against the country's own population and against the population of other States), the question was raised whether the injured States could envisage humanitarian intervention, namely the use of armed force. The Commission was invited to reflect on those questions; otherwise, it would leave States at complete liberty to invoke the still vague concept of humanitarian intervention.

(iii) _The punitive implications of the concept of crime_

289. Some members stressed that, while the notions of fault and punishment had no place in the regime of responsibility for ordinary breaches of

international law, the same was not true in the case of crimes. Reference was made in this connection to the measures taken against the Axis Powers after the Second World War, as well as the "political sanctions" (territorial transfer, military occupation, sequestration or confiscation of assets, armaments control, population transfers, dismantling of industries, demilitarization, etc.) enumerated, although not elaborated upon, by the Special Rapporteur in his fifth report.

290. Other members pointed out that punishment was not lex lata and that the regime imposed by the victors on the vanquished in 1945 had been ruled out by the Charter for the future, as demonstrated by the inclusion of the reservation contained in Article 107. They strongly objected to the idea that a coalition of victorious Powers might unilaterally and arbitrarily, at their political discretion, annex parts of the territory of an aggressor State and expel its population, in violation of the basic principles of humanitarian law and human rights and of the instruments which prohibited territorial acquisition by force, even as a result of the exercise of the right of self-defence. It was suggested in this context to include in the draft an express prohibition of punitive consequences even in the case of crimes threatening the territorial integrity of States. In support of this approach, the remark was made that, if retribution and revenge were the sole objectives, tension would only be perpetuated and that, while the victim was admittedly entitled to reparation and satisfaction, the objective of reconciliation should not be sacrificed on that account. There was also insistence on the need to avoid alienating the accused State which would, together with its population, continue to be part of the international society.

291. The question of the guilt and liability of the population was generally viewed as a particularly difficult one and a warning was uttered against simplistic answers that would disregard the multiplicity of relations existing within a given State or among States in general. Reference was made in this context to genocide, the primary victim of which was the population of the State which perpetrated it.

292. While some members agreed with the Special Rapporteur that the population of a criminal State might not be entirely innocent, most others struck a note of caution in this respect. It was remarked that the temptation was great to make the people which had applauded the crime committed suffer the consequences of its behaviour, but it must not be forgotten that public opinion was easily hoodwinked not only in countries under a despotic regime

but even in democratic countries. Several members also observed that punitive measures could easily affect innocent people, women and children, and even those members of the society in question who had, individually or collectively, been opposed to the crime; and that sanctions against a State were lawful only if they were taken in respect for the rights of the people concerned in accordance with a strict procedure, and if some limits were placed on the undoubtedly inevitable acknowledgement of a certain degree of culpability.

293. Several members stressed that a balance must be found. Attention was drawn in this context to Chapter VII of the Charter, which perhaps provided the beginnings of an answer, since it required consideration to be given to the economic and other repercussions on other States and populations of sanctions decided by the Security Council, and safeguards to be provided against their consequences having a disproportionate effect on populations.

294. Attention was also drawn to the possibility of recourse to measures which, although constituting a punishment, would not affect the population of the State concerned, for example the dismantling of arms factories and prohibition of the manufacture of certain armaments, or again measures designed to protect the population, for example placing the State concerned under international control through a decision either of the victor States acting in self-defence or of a body having international jurisdiction.

295. Several members took the view that the solution to the problem lay in the prosecution and punishment of responsible leaders and officials. In this connection, however, the remark was made that the suggestion that the prosecution of individuals might be a form of aggravated countermeasures was wholly inadmissible on the grounds of due process as the guilt or innocence of an individual was distinct from that of the State and had to be judged independently.

(iv) The role of the United Nations in determining the existence and the consequences of a crime

296. Some members observed that the Organization was the most convincing expression of the "organized international community" and, the normal instrument for reacting to crimes. Others pointed out that the Charter regime provided only a fragmentary response to the problem under discussion and that, notwithstanding its principles and purposes, the United Nations was not a

super State endowed, on a higher plane, with powers comparable to those of a State at the national level; nor could it exercise the full panoply of powers of a nation State or impose sanctions for breaches of the law.

297. While there was a view that the Commission might well consider recommending a review of the Charter and of the Statute of the International Court of Justice as well as a number of other institutional innovations that would prove necessary to implement certain ground rules applicable to international crimes of States, the prevailing opinion was that the Commission should refrain from taking such a course of action, bearing in mind that its task was to codify and progressively develop international law and that it did not have the power to confer a new jurisdiction upon the United Nations and its bodies.

298. As regards the role of the Security Council, the members who addressed the issue generally distinguished between the category of internationally wrongful acts referred to in paragraph 3 (a) of article 19 (including aggression), and the categories listed in paragraphs 3 (b), (c) and (d) of the same article.

299. As regards aggression, comment focused on the role of the Council in (1) determining the existence of an internationally wrongful act and (2) prescribing the corresponding consequences.

300. On the first point, the view was expressed that nothing precluded the Security Council from determining the existence of a crime under the powers conferred on it by the Charter, provided the alleged act was one which would give rise to the situations referred to in Article 39 of the Charter. In the words of one member, there was no question that the Council had the power to determine that an act of aggression had been committed; it followed that, if aggression was recognized as a crime, the Council was empowered to determine that a crime had been committed.

301. A note of caution was however struck in this respect. Several members stressed that the Security Council had neither the constitutional function nor the technical means to determine the commission of a crime. The Council, it was stated, was a political body endowed with political powers, which could not without acting ultra vires decide on the judicial responsibility of a State. Attention was also drawn in this context to the absence in the Charter regime of a control mechanism to determine if and when the Council overstepped and abused its authority.

302. With reference to those concerns, some members drew attention to the system of checks and balances aimed at minimizing the risk that the Council might adopt a patently illegal decision. It was furthermore suggested that any determination of aggression by the Council be open to challenge under a rule to be inserted in article 19 by virtue of which the State characterized as an aggressor could refer the matter to a judicial body, perhaps the International Court of Justice. Another suggestion was that the Council's determination should take the form of a presumption rather than a definitive conclusion.

303. As regards the second point mentioned in paragraph 299 above, the view was expressed that the Council was empowered to decide on the sanctions to be imposed on those responsible within the framework of the powers conferred on it under Chapter VII of the Charter. It was said in this connection that the Council would have a central role to play in connection with measures that could undermine the independence, sovereignty or territorial integrity of the State which committed the crime and, in particular, of armed action, and that its intervention would be a condition for the lifting of the prohibitions laid down in article 14. The view was also expressed that although the Security Council had never yet taken punitive measures, the reason being that it had never yet decided that a crime had been committed or even determined that an aggression had occurred, nevertheless the Charter enabled it to conclude, once a crime of aggression had been determined, that collective sanctions should embrace punitive measures which were appropriate for a crime.

304. Other members emphasized that the Council was not intended to operate as a sanctions mechanism. They observed that the Council had a policing function geared towards the maintenance of international peace and security, that it had rarely adopted mandatory sanctions and that the case of Iraq in which the Council had imposed obligations on Member States that might affect their conduct was a special one from which one could not draw the general conclusion that the United Nations could prescribe consequences for the international crimes enumerated in article 19. Concern was expressed in this context that, although punitive measures were presented as a thing of the past which had no place in a modern codification of international law, the world should witness a tendency in the practice of the Security Council not to abandon punitive measures but to disguise them as _restitutio_ or guarantees of non-repetition. The Commission was invited to ask itself whether, at a time when severe measures were taken on the basis of the "organic reaction" of the world

community against a State committing a crime, and when it was claimed that a reaction of that kind lay outside the responsibility regime, it ought to accept the unfettered exercise of power to conceal a severe punitive intent in the regime of the maintenance of international peace and security.

305. As regards the categories of internationally wrongful acts referred to in paragraphs 3 (b), (c) and (d) of article 19, the remark was made that the Security Council could be presumed to have the competence to determine that they had been committed where they entailed a breach of the peace within the meaning of Article 39 of the Charter. Some members favoured a broad interpretation of the powers of the Council under Chapter VII or envisaged the possibility that the Council's competence would cover all the breaches which might be contemplated in article 19 in a revised form.

306. Concern was however expressed that any attempt to bring crimes other than aggression within the category of the maintenance of international peace and security would give rise to dangerous juxtapositions, with the attendant blurring of distinctions, debatable conclusions and questioning of the powers of the Security Council. The remark was made in this context that the current trend towards a considerable broadening of the concept of threat to the peace had its limits and that an exaggerated extension of that concept was probably not very sound.

307. Concern was also expressed that the Security Council was very much influenced by its procedure (and, in particular, by the right of veto which conferred permanent immunity on at least five countries and on a few others) and consequently it could neither create a court nor effectively recognize responsibility for crime. Reference was made in this context to the current developments concerning the permanent membership of the Council and the remark was made that a more balanced representation of various regional groups, served by a more equitable distribution of permanent seats, would enhance the Security Council's credibility in identifying certain international crimes and in authorizing collective punitive or self-defence operations on behalf of the international community.

308. Several members referred to the question raised by the Special Rapporteur in his fifth report whether Security Council resolutions 687 (1991), 748 (1992) and 808 (1993) reflected an expansion in the Security Council's competence.

309. Most of the members who commented on this question answered it in the negative. It was stated in particular that each of the above-mentioned

resolutions dealt with the maintenance of international peace and security, i.e. the area of responsibility of the Security Council. In this context however, one member held the view that the Council had at times exceeded its authority under the Charter. Attention was drawn by several members to the fact that whether there had been an evolution in the competence of the Security Council was a question of interpretation of the Charter which fell outside the Commission's mandate.

310. Some members insisted on the distinction to be made between the powers of the Security Council and the rules on State responsibility. While the remark was made that the Council did not have the power to enact new rules beyond the Charter provisions and was bound to apply the law within the limits of its competence, it was also emphasized that the Council's powers were in no way conditioned by the rules under discussion. Support was expressed for the inclusion in the draft articles of a clause along the lines of article 4 of Part Two which would reserve the competence of the United Nations or certain regional bodies in the event of a threat to peace or aggression and prevent any broadening of the exceptions to the prohibition of the use of force. Objections were however raised against any formula which would subordinate the applicability of the articles on State responsibility to the decisions of the Council or divest them of any meaning in certain situations at the discretion of a political body.

311. Several members expressed the opinion that the General Assembly had a role to play in the case of crime since, it was said, it reflected the conscience of the international community. It was pointed out that, on the basis of the Charter, the Assembly could deal with a wide range of issues and made the most of its powers; although, in regard to a reaction to a wrongful act as in all others, it had no power of decision, it was in a position, through recommendations, to allow and authorize conduct that could have a considerable impact in matters pertaining to the issue under consideration. Reference was made in this context to the many resolutions in which the General Assembly had declared that peoples subjected to colonial or foreign domination - a crime under article 19, paragraph 3 - could use all means to combat such domination.

312. Emphasis was however placed on the limits to the role of the Assembly in the area under consideration, bearing in mind that the determination of the consequences of a crime was primarily an act of a judicial nature. Several members furthermore warned against engaging within the Commission in a debate

on the powers of United Nations organs or on the scope of Article 51 of the Charter. It was pointed out that it was the Security Council that might order the use of armed force under Article 42 of the Charter and that the right of self-defence was subject to strict conditions under Article 51. Strong doubts were expressed as to the possibility, in the present political climate, to legally adapt the existing powers of United Nations organs to the tasks flowing from article 19 of Part One, the more so as such an adaptation would involve an examination of primary rules and went beyond the Commission's mandate. While recognizing that it was not for the Commission to fill the gaps in the Charter or to review it, some members suggested that means should be provided for taking full advantage of the powers and functions of United Nations organs instead of relying solely on Chapter VII and on the Security Council, to which systematic reference was actually a facile solution, as one member put it.

313. As regards the International Court of Justice, several members stressed that an ultimate determination as to whether a crime had been committed could only be entrusted to a judicial organ. It was recalled in this context that the Court could pronounce on the existence of any breach of international law including the existence of a crime and draw the necessary conclusions. The formula adopted in the 1969 Convention on the Law of Treaties was viewed as the only acceptable substitute for the determination by the State itself of the commission of a crime.

314. Attention was however drawn to the limits to the jurisdiction of the Court, because of the consensual basis of its competence. The conferment of compulsory jurisdiction on the Court in the cases under consideration would, it was stated, be tantamount to a real revolution in international law.

(v) Possible exclusion of crimes from the scope of application of the provisions on circumstances precluding wrongfulness

315. The remark was made that, having regard to the definition contained in article 19, paragraph 2, and to the erga omnes nature of the obligation breached in the case of a crime, and bearing in mind article 29, paragraph 2, it was already established that consent could not preclude the wrongfulness of a crime. As regards state of necessity, attention was drawn to paragraph 2 (a) of article 33, which likewise made an exception in the case of a peremptory norm of general international law, so that the problem was

already settled. As to force majeure dealt with in article 31, the remark was made that it could hardly apply in the case of crimes since a crime involved premeditation.

316. According to one view, the above analysis confirmed that there was no point to the crime/delict distinction. According to another view, the non-applicability of circumstances precluding wrongfulness was part of the special legal regime applicable to crimes.

(vi) The general obligation of non-recognition of the consequences of a crime

317. Some members observed that the normal illustration of this obligation related to the acquisition of territory. Several issues were raised in this connection. It was first pointed out that by providing for an obligation not to recognize as legal any territorial acquisition resulting from the use of force, one returned to the primary rule prohibiting the use of force against territorial integrity and against the rights of peoples and entered the realm of primary rules, in disregard of the Commission's decision to deal only in the draft on State responsibility with "secondary rules". The remark was also made that, in State practice, acquisition of territory resulting from the use of force need not be characterized as a State crime: the duty not to recognize such acquisition was a consequence not only of crimes but also of delicts and acquisition of territory resulting from the use of force in exercise of self-defence, although not a crime, was still a wrongful act to which the duty of non-recognition should apply. A further issue which was mentioned in this context was that most criminal conduct was criminal by reason of its consequences in fact and that facts had to be recognized, the question being whether one recognized legal consequences as well.

318. The members who addressed the issue agreed that the general obligation of non-recognition of the consequences of crimes of aggression arose from a decision of the Security Council. One of them however took the view that the obligation in question might also be triggered by an authoritative statement of the General Assembly.

(vii) The general obligation not to aid a "criminal" State

319. The remark was made that this matter pertained to complicity and was one of primary law. One member, while agreeing that the passive duty of non-recognition was confined to certain classes of wrongful acts when the validity of the measure taken was at issue, pointed out that the duty of non-assistance to the offending State, which, in his opinion, covered delicts

as well as crimes, was not confined to acts where validity was at issue. A further observation was that there was no obligation de lege lata or de lege ferenda to render aid to the victim of a crime.

(c) The courses of action open to the Commission

320. According to one body of opinion, the Commission, despite the difficulties to which the concept of State crimes gave rise, should pursue its task unflinchingly and concentrate on defining the consequences of the most serious internationally wrongful acts, which inevitably differed, at both the substantive and the instrumental levels, from those of delicts. It was stressed that a thorough study of the consequences of crimes, maintaining the balance between codification and progressive development, would enable the Commission to decide on second reading, with a full understanding of the matter, as to the validity of the dichotomy established at the beginning. The Commission was therefore invited to devote itself as a matter of priority to instituting the special regime of responsibility for crimes, in accordance with its mandate, which had been renewed regularly by the General Assembly since 1976. Confidence was expressed that, while there were other possible alternatives, 359/ the most likely scenario was that the Commission would identify appreciable differences in the consequences of the two categories of internationally wrongful acts, based on acceptance of article 19. It was suggested that, in order to facilitate its task, the Commission should establish cooperation with outside experts, bearing in mind that any progress accomplished on this subject might help to strengthen the primacy of law in international relations, prevent conflicts and facilitate their settlement.

321. According to another body of opinion, the Commission would be unwise to embark on the formulation of detailed provisions concerning the consequences of crimes, given the very real risk that it might ultimately fail in its efforts to elaborate a workable definition of "State crime" and identify only trivial consequences, harmful to other more realistic aspects of the law and likely to enhance the threat of peace and security or to erode the viability of the concept of erga omnes violations in general. The remark was also made

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359/ The Commission could, it was stated, defer the issue to second reading, at which stage it would either successfully deal with the matter or decide to expressly exclude from the scope of the draft the most serious internationally wrongful acts or, alternatively, reach the conclusion that crimes did not entail consequences different from those of delicts, the question then arising whether article 19 should be eliminated despite its ideological and symbolic weight.

that any effort to elaborate the consequences that might flow from State crimes would depart from the basic premise that the draft was to be confined to secondary rules, confront the Commission with implementation problems, trespass on the Charter regime and be a distraction from the important task of developing a satisfactory regime dealing with general issues of State responsibility.

322. While warning against any hasty reconsideration of article 19, whose adoption was, it was recalled, described by the Commission in the relevant commentary as a "step comparable to that achieved by the explicit recognition of the category of rules of _jus cogens_ in the codification of the law of treaties", several members agreed that it would be impossible for the Commission, within the time-limits it had set itself, to elaborate rules on the consequences of international crimes, having regard to the doubts which existed on the distinction established in article 19 between crimes and delicts and bearing in mind the scarcity of relevant practice and the sensitive character of the issue which touched upon State sovereignty.

323. At the _procedural level_, the drawing up of an appropriate regime for international crimes was considered by some as urgent. It was on the other hand suggested that the Commission should report the difficulties it faced to the General Assembly and refrain, at the stage of first reading, from presenting articles on the consequences of international crimes, while reserving the opportunity to do so on second reading. The idea that the Commission seek the guidance of the Sixth Committee gave rise to objections, as did also the suggestion that State crimes form the subject of a separate topic.

324. At the _substantive level_, various ideas were put forward: the Commission, it was said, might confine itself to noting the existence of a close link between the material consequences of crimes and the reaction to those consequences of the international community as a whole. Another possible approach which was mentioned was to retain article 19 in an amended form, to include in Part Two a clause saying that the application of the draft articles to cases constituting crimes as defined in article 19 was a matter not dealt with by the draft articles and that those articles were without prejudice to such application, in accordance either with the Charter or with general international law and, finally, to ensure that the rules in Part Two were adapted to deal with State crimes in their manifestation as

internationally wrongful acts. A further suggestion was that the draft be confined for the present to the formulation of norms concerning the consequences of aggression, genocide and apartheid.

(d) Conclusions of the Special Rapporteur on the debate

325. With reference to the general question whether the article 19 distinction among international delinquencies should be maintained, the Special Rapporteur noted that, for most members, extremely serious breaches of international law called for separate treatment within the framework of the first reading of the project: while some members saw a mere difference of degree in the gravity of international delinquencies, the prevailing opinion was that the dichotomy was based upon a difference in nature. On the other hand, there was a view that the draft on State responsibility should not deal with a distinct category of "crimes". The elimination from the draft of any distinction whatsoever was also advocated by some.

326. As regards article 19, the Special Rapporteur observed that according to the majority, the present wording, notwithstanding its defects, should stand, subject to improvement on second reading based on developments in the practice of States and in the literature. He noted that despite some reservations, a fair number of members seemed inclined to maintain the term "crimes", without however, excluding the possibility of finding a better alternative. Others favoured abandoning the term "crime" because of its national criminal law connotations. Some suggested as a substitute a reference to extremely serious violations of jus cogens rules. The Special Rapporteur further observed that while the basic elements of the definition were generally accepted, particularly the reference to the violation by a State of an international obligation of essential importance for the safeguard of fundamental interests of the international community, the list in paragraph 3 of article 19 was viewed by most speakers as calling for reconsideration or as belonging in the commentary.

327. On the courses of action open to the Commission, the Special Rapporteur noted that a few members had suggested to submit to the General Assembly a first reading text not covering the consequences of crimes, to call the parent body's attention to the doubts expressed by numerous members with regard to the possibility of codifying the matter unless a better definition of crimes was worked out and to defer the decision on the fate of article 19 and the consequences of crimes to the second reading of the draft. He at the same time noted that the majority of members, except of course those totally

opposed to the article 19 dichotomy, thought it better for the Commission to explore all possible alternatives in the form of draft articles to be considered if possible by the Drafting Committee at the next session, and to verify the solution at the second reading stage.

328. On the question of who was competent to determine that a crime had been committed in a given case and to implement the applicable regime, the Special Rapporteur pointed out that the debate had brought to light two sets of problems. One problem which some speakers seemed to consider as related to Part Three of the draft was which organ would be competent to settle possible disputes over the existence and attribution of a crime and decide on the legitimacy of the reaction and on the measures called for by the situation. The other problem - surely a Part Two problem - was who could legitimately react, either by claiming compliance with substantive obligations (cessation, reparation, satisfaction, guarantees of non-repetition) or resorting to measures (countermeasures or sanctions).

329. As regards the first problem, the Special Rapporteur remarked that some speakers favoured the establishment of the compulsory jurisdiction of the International Court of Justice perhaps in an additional protocol and that others questioned this solution in view of the reluctance of States to go to the Court for important questions and bearing in mind the voluntary nature of the Court's jurisdiction. Many speakers had emphasised the necessity to envisage a verification mechanism of a judicial nature, for such a body to decide on the basis of law.

330. On the second problem, namely who can legitimately react - the Special Rapporteur observed that it was generally recognized (except by the few speakers radically opposed to the idea of a special regime for crimes) that the reaction to a crime (including the very qualification and attribution of a crime) should ideally emanate from an international organ capable of interpreting and implementing the "will" of the international community as a whole such organs to apply, directly or through binding decisions addressed to States, the consequences more or less mandatorily provided for by international law. In this context, he seriously doubted the notion that at the moment there existed such a thing as an organized international community; in his opinion, the claim that the United Nations were the expression of a properly organized international community was highly questionable. In this connection, he noted that there was general agreement that the so-called international community was not endowed at present, and was not likely to be

endowed in the near future, with an adequately representative organ entrusted with the function of implementing the regime of crimes and organizing the reaction, subject to an appropriate judicial verification of the legitimacy of characterization and reaction. He further remarked that almost all speakers were agreed that, at least for crimes consisting of aggression or a breach of the peace, a collective reaction system did exist in Chapter VII of the Charter, although it was not conceived for, and not easily adaptable *per se*, to the implementation of a regime of responsibility.

331. With regard to the *de lege lata* or *de lege ferenda* competence of United Nations bodies in the implementation of the reaction to crimes, the Special Rapporteur noted that the majority seemed to share his view, as expressed in his fifth report, [360] that even for such a crime as aggression, the Council would not qualify as the specifically competent organ for collective reaction either *ratione materiae* (for example with regard to reparation) or from the viewpoint of legal versus political evaluation criteria or, for that matter, from the viewpoint of an elementary exigency of impartiality, hardly reconcilable with the fact that the so-called veto power would ensure a virtual immunity for some States. He observed that if, on the one hand, the regime to be envisaged for the implementation of the consequences of crimes should in no way put into question the important Security Council's powers relating to the maintenance (and re-establishment) of peace, it would not be appropriate, on the other hand, to assume that the Security Council could unconditionally be recognized as a competent body for the implementation of the legal regime of international crimes of States, especially with regard to the three categories of crimes other than aggression. He recalled that, in view of these difficulties, some of the speakers had suggested either circumscribing the definition of crimes to the hypotheses contemplated in Chapter VII of the Charter or dealing separately with the crimes related to those hypotheses in order to take better account of the Security Council's possibilities of action with respect to such crimes.

332. The Special Rapporteur emphasized that a number of speakers had warned against interfering with the function of the Security Council, which had a political role aimed at the maintenance of international peace and security and was concerned neither with the prerequisite of the commission of a crime nor with stating the law and sanctioning the author. In particular, no

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[360] A/CN.4/453/Add.3, paras. 89 et seq., especially 102-125 and 110-115.

amendment to the Charter seeking to entrust the Council with new functions should be envisaged and the draft should indicate that its provisions relating to crimes were without prejudice to the Charter procedures relating to the maintenance of international peace and security.

333. The Special Rapporteur further observed that, while some were inclined to rely on the Security Council for the sole implementation of the consequences of the crimes corresponding to the hypotheses covered by Chapter VII of the Charter, a more liberal interpretation of the Council's powers had been suggested by other speakers, with a view to encompassing crimes other than those corresponding to Chapter VII hypotheses and that attention had also been drawn to a desirable re-evaluation of the role of the General Assembly as an expression of the "conscience" of the international community as a whole.

334. The Special Rapporteur noted that a majority of the participants in the debate had struck a note of caution as to the possibility of leaving the reaction to a crime in the hands of individual injured States (or small groups of States) and had deemed a collective response to be desirable either from United Nations organs - Security Council or General Assembly (the latter being competent to deal with all the kinds of situations which may involve a crime) - or, according to a few speakers, other collective bodies to be established. Consultation procedures had also been suggested. He further remarked that a number of speakers had expressed themselves very firmly against leaving any room for unilateral initiatives of States or groups of States, especially for the most severe measures or sanctions in the absence of any manifestations of a "collective will", while others had taken the view that some room for unilateral measures should be left for all States either in case of failure of a timely and effective reaction of the so-called organized international community or to supplement such collective reaction, provided, however, that no armed reaction would be acceptable.

335. Concerning the objective aspects of the consequences of international crimes of States, namely the nature and degree of aggravated consequences, the Special Rapporteur noted, as regards substantive consequences, widespread acceptance of the idea that not all the exceptions envisaged in articles 7 and 10 should apply in the case of crimes: more particularly restitution in kind would only be subjected to the jus cogens and physical impossibility restrictions and satisfaction could include not only heavy "punitive damages" but also measures affecting "internal sovereignty", domestic jurisdiction and the State dignity.

336. As regards instrumental consequences, the Special Rapporteur detected a high degree of agreement with regard to the prohibition, even in the case of crimes, of armed measures, except, of course, for measures taken in individual or collective self-defence or adopted by the Security Council under Chapter VII for situations involving the crime of aggression - which, in his view, seemed to confirm a widespread preference for a differentiated treatment of the crime of aggression as opposed to the other kinds of crimes singled out in article 19.

337. With regard to collective self-defence, the Special Rapporteur remarked that, according to one speaker, the draft should insist on the limits of self-defence and make it clear that a State was entitled to act in collective self-defence only at the request of the attacked State or on the basis of an alliance or regional security treaty. He further observed that except for self-defence, the use of force was generally recognized to be, even in reaction to a crime, the exclusive prerogative of the so-called "organized international community" (and particularly of the Security Council) whose prior authorization was required for the use of force in cases other than aggression, including genocide or humanitarian intervention.

338. The Special Rapporteur noted that for most speakers, the envisaged "heavier" - but in no case armed - measures should fall short of the degree of intensity of the measures applied by the victorious party against a vanquished State and that, according to one view, any measure attaining a high degree of intensity should be conditional upon a collective decision genuinely representative of the common interest of the acting States, unilateral or small groups' initiatives to be condemned. Such measures included, in the opinion of a number of speakers, the pursuit of the criminal liability of the responsible individuals who operated in key positions of the law-breaking State's structure.

339. The Special Rapporteur pointed out that some members viewed as inadmissible breaches of jus cogens rules in reaction to a crime (like violations of the prohibition of force) and that in the view of a number of them, the measures directed against a State author of a crime could go beyond the mere pursuit of reparation subject to the rule of proportionality. Some speakers had furthermore stressed the necessity of condemning, even in the case of crimes, any measures affecting the territorial integrity of the State or the identity of the people.

340. As regards concerns over the population of the law-breaking State, the Special Rapporteur noted that, although any particularly severe effects for the populations should be carefully avoided, a few speakers saw merit in making the peoples themselves aware of the dangers that could derive for them from attitudes amounting to more or less over "complicity" in the criminal actions of a democratic or non-democratic government or despot.

341. From the above, the Special Rapporteur concluded that, apart from those few speakers who contested as a matter of principle the legal or political propriety of the distinction between delicts and crimes, only one speaker had expressly contested the existence of any differentiation in the consequences between crimes and delicts. He further observed that a certain degree of consensus had emerged in relation to a general obligation - conditional however on a pronouncement of the so-called organized international community - not to recognize as valid in law any situation from which the law-breaking State had derived an advantage as a result of the crime and that some also acknowledged the existence of a general obligation not to help in any way the law-breaking State to maintain the favourable situation created to its advantage by the crime.

342. Mention had also been made of a general duty of "active solidarity" with the victim State or States, involving an obligation to comply in good faith with the measures decided by the international community, or by States themselves "in concert", in response to an international crime of State.

343. The Special Rapporteur concluded that, although no firm and specific solutions had emerged, the debate had provided sufficient indications to enable him to work out, in time for the next session, proposals relating to the consequences of crimes, in the form of articles or paragraphs of Part Two and Three, which could, once discussed, be referred to the 1995 Drafting Committee. He expressed confidence that together with the completion of the work already in progress on Parts Two and Three, this would allow the Commission to conclude in time the first reading of the draft articles on State responsibility.

(e) Views expressed subsequent to the formulation by the Special Rapporteur of his conclusions on the debate

344. Some members expressed the opinion that, in view of the Special Rapporteur's estimation in his summing up (see para. 326 above), it should be stressed that there was a substantial body of opinion having reservations on the language of article 19 of Part One of the draft articles. If constructive

efforts were to be made for Part Two, it would seem advisable to move on, based on a distinction, not necessarily between crimes and delicts, but between quantitatively less serious and more serious internationally wrongful acts. These members also expressed reservations concerning the conclusions indicated in paragraph 231 above.

345. Some other members expressed the opposite view, pointing out that, notwithstanding the discussion to which article 19 and the distinction between crimes and delicts had given rise, this article and this distinction provided a base for the continuation of the Special Rapporteur's work and the elaboration of draft articles to be submitted to the Commission.

346. The Commission concluded as indicated in paragraph 231 above.

2. Pre-countermeasures dispute settlement procedures so far envisaged for the draft articles on State responsibility

347. As indicated in paragraph 228 above, the Commission at its last session received from the Drafting Committee four articles - namely articles 11 (Countermeasures by an injured State), 12 (Conditions relating to resort to countermeasures), 13 (Proportionality) and 14 (Prohibited countermeasures) - on the instrumental consequences of internationally wrongful acts which were introduced by the Chairman of the Drafting Committee at the 2318th meeting of the Commission but were not acted upon pending the submission of the relevant commentaries.

348. At the current session, the Special Rapporteur, in Chapter II of his sixth report indicated that some of the issues raised by the formulation of articles 11 and 12 as adopted by the Drafting Committee at the previous session could usefully be reconsidered. He furthermore proposed reformulations for those two articles (see document A/CN.4/461 and Add.2 and Add.2/Corr.1).

349. The Commission considered Chapter II of the Special Rapporteur's sixth report at its 2353rd meeting.

350. At that same meeting, the Commission referred the proposed reformulations of articles 11 and 12 as contained in Chapter II of the Special Rapporteur's

sixth report to the Drafting Committee 361/ and instructed the Committee to examine the possibility of modifying, in the light of the said proposals, articles 11 and 12 as adopted by the Committee at the previous session, it being understood that if this proved impossible, articles 11 and 12 as previously adopted by the Committee would be reverted to and form the basis of the action to be taken by the Commission.

351. At the 2366th meeting of the Commission, the Chairman of the Drafting Committee introduced a revised version of article 11 and informed the Commission that the Drafting Committee had not found it possible to modify article 12 as adopted by the Drafting Committee at the previous session.

352. At the same meeting, the Commission, after examining the recommendations of the Drafting Committee, adopted provisionally articles 11 (Countermeasures by an injured State), 13 (Proportionality) and 14 (Prohibited countermeasures) 362/ for inclusion in Part Two of the draft articles and

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361/ The Special Rapporteur, subsequent to the referral of his proposed reformulations to the Drafting Committee, submitted a revised version of the text he had proposed for article 12 (see A/CN.4/L.461/Add.3)

362/ The articles read as follows:

"Article 11

Countermeasures by an injured State

1. As long as the State which has committed an internationally wrongful act has not complied with its obligations under articles 6 to 10 bis, the injured State is entitled to take countermeasures, that is, subject to the conditions and restrictions set forth in articles 12, 13 and 14, not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act, as necessary in the light of the response to its demands by the State which has committed the internationally wrongful act in order to induce it to comply with its obligations under articles 6 to 10 bis.

2. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified as against the third State by reason of paragraph 1.

Article 13

Proportionality

Any countermeasure taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

deferred taking action on article 12. It was agreed that article 11 might have to be reviewed in the light of the text that would eventually be adopted for article 12.

353. Pending adoption of article 12 and the submission of the relevant commentaries, the Commission decided not to formally submit articles on countermeasures to the General Assembly; it expects to submit a complete set of articles on this question to the Assembly next year.

Article 14

Prohibited countermeasures

An injured State shall not resort, by way of countermeasure, to:

(a) the threat or use of force as prohibited by the Charter of the United Nations;

(b) extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed an internationally wrongful act;

(c) any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(d) any conduct which derogates from basic human rights; or

(e) any other conduct in contravention of a peremptory norm of general international law."

CHAPTER V

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

A. Introduction

354. The Commission, at its thirtieth session (1978), included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur. 363/

355. The Commission, from its thirty-second (1980) to its thirty-sixth session (1984), received and considered five reports from the Special Rapporteur. 364/ The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

356. The Commission, at its thirty-sixth session (1984), also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline 365/ and a study prepared by the

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363/ At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic, and to report to it thereon. For the report of the Working Group see Yearbook ... 1978, vol. II, (Part Two), pp. 150-152.

364/ For the five reports of the Special Rapporteur, see Yearbook ... 1980, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2; Yearbook ... 1981, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2; Yearbook ... 1982, vol. II (Part One), p. 51, document A/CN.4/360; Yearbook ... 1983, vol. II (Part One), p. 201, document A/CN.4/373; Yearbook ... 1984, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

365/ Yearbook ... 1984, vol. II (Part One), p. 129, document A/CN.4/378.

secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law". 366/

357. The Commission, at its thirty-seventh session (1985), appointed Mr. Julio Barboza Special Rapporteur for the topic. The Commission received eight reports from the Special Rapporteur from its thirty-seventh (1985) to its forty-fourth session (1992). 367/ At its fortieth session (1988), the Commission referred to the Drafting Committee draft articles 1 to 10 proposed by the Special Rapporteur for Chapter I (General Provisions) and Chapter II (Principles). 368/ At its forty-first session (1989), the Commission also referred to the Drafting Committee the revised version of those articles which had already been referred to the Drafting Committee at the previous session. 369/

358. At its forty-fourth session (1992), the Commission established a Working Group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic. 370/ On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting on 8 July 1992, took the following decisions:

366/ Yearbook ... 1985, vol. II (Part One) Addendum, document A/CN.4/384.

367/ For the seven reports of the Special Rapporteur, see Yearbook ... 1985, vol. II (Part One), p. 97, document A/CN.4/394; Yearbook ... 1986, vol. II (Part One), p. 145, document A/CN.4/402; Yearbook ... 1987, vol. II (Part One), p. 47, document A/CN.4/405; Yearbook ... 1988, vol. II (Part One), p. 251, document A/CN.4/413; Yearbook ... 1989, vol. II (Part One), p. 131, document A/CN.4/423; document A/CN.4/428 and Corr.1 and 4 (all languages), Corr.2 (English only), and Corr.3 (Spanish only) and Add.1; document A/CN.4/437 and Corr.1 and document A/CN.4/443 and Corr.1 and Corr.2 (Spanish only).

368/ For the text see Yearbook ... 1988, vol. II (Part Two), p. 9.

369/ See Yearbook ... 1989, vol. II (Part Two), para. 311. Further changes on some of those articles were again proposed by the Special Rapporteur in his Sixth Report, see (Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10) (A/45/10), para. 471.

370/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10 (A/47/10), p. 127-129.

"(a) Scope of the topic

(i) The Commission noted that, in the last several years of its work on this topic, it has identified the broad area and the outer limits of the topic but has not yet made a final decision on its precise scope. In the view of the Commission, such a decision at this time might be premature. The Commission, however, agreed that, in order to facilitate progress on the subject, it would be prudent to approach its consideration within that broad area in stages and to establish priorities for issues to be covered.

(ii) Within the understanding set forth in paragraph (i) above, the Commission decided that the topic should be understood as comprising both issues of prevention and of remedial measures. However, prevention should be considered first; only after having completed its work on that first part of the topic would the Commission proceed to the question of remedial measures. Remedial measures in this context may include those designed for mitigation of harm, restoration of what was harmed and compensation for harm caused.

(iii) Attention should be focused at this stage on drafting articles in respect of activities having a risk of causing transboundary harm and the Commission should not deal, at this stage, with other activities which in fact cause harm. In view of the recommendation contained in paragraph (ii) above, the articles should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm and then with articles on the remedial measures when such activities have caused transboundary harm. Once the Commission has completed consideration of the proposed articles on these two aspects of activities having a risk of causing transboundary harm, it will then decide on the next stage of the work."

"(b) The approach to be taken with regard to the nature of the article or of the instrument to be drafted

(iv) In the view of the Commission it would be premature to decide at this stage on the nature of either the articles to be drafted or the eventual form of the instrument that will emerge from its work on this topic. It would be prudent to defer such a decision, in accordance with the usual practice of the Commission, until the completion of the work on the topic. The Commission will examine and adopt the articles proposed for this topic, in accordance with its usual practice, on the basis of the merits of the articles, their clarity and utility for the contemporary and future needs of the international community and their possible contribution to the promotion of the progressive development of international law and its codification in this area."

"(c) Title of the topic

(v) In view of the ambiguity in the title of the topic as to whether it includes 'activities' or 'acts', the Commission decided to continue with its working hypothesis that the topic deal with 'activities' and to defer any formal change of the title, since in the light of the future work on the topic additional changes in the title may be necessary. The Commission will therefore wait until it is prepared to make a final recommendation on the changes in the title."

"(d) Recommendation on the report of the Special Rapporteur for the next year

(vi) The Commission took note with thanks and appreciation of the previous reports of the Special Rapporteur in which the issues of prevention were examined in respect of both activities having a risk of causing and those causing transboundary harm. It requested that the Special Rapporteur, in his next report to the Commission, should examine further the issues of prevention only in respect of activities having a risk of causing transboundary harm and propose a revised set of draft articles to that effect." 371/

359. At its forty-fifth session (1993), the Commission considered the ninth report of the Special Rapporteur (A/CN.4/450) devoted to the issue of prevention and referred draft article 10 (non-discrimination), which the Commission had examined at its forty-second session (1990), and articles 11 to 20 bis to the Drafting Committee. The Drafting Committee provisionally adopted articles 1 (scope of the present articles), 2 (use of terms), 11 (prior authorization), 12 (risk assessment) and 14 (measures to minimize the risk). 372/ However, the Commission took no action on the articles. 373/

B. Consideration of the topic at the present session

1. Draft articles adopted by the Drafting Committee at the forty-fifth and forty-sixth sessions of the Commission

360. At its 2362nd to 2366th meetings held between 8 and 13 July 1994 the Commission considered and provisionally adopted article 1 (Scope of the present articles), paragraphs (a), (b) and (c) of article 2 (Use of terms), article 11 (Prior authorization), article 12 (Risk assessment), article 13 (Unauthorized activities), article 14 (Measures to prevent or minimize the risk), article 14 bis [20 bis] (Non-transference of risk), article 15 (Notification and information), article 16 (Exchange of information), article 16 bis (Information to the public), article 17 (National security and

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371/ Ibid.

372/ Document A/CN.4/L.487 and Corr.1 (French and Spanish only)

373/ See Official Records of the General Assembly, Forty-eight session, Supplement No. 10 (A/48/10), p.46, para. 106.

industrial secrets), article 18 (Consultations on preventive measures), article 19 (Rights of the State likely to be affected) and article 20 (Factors involved in an equitable balance of interests) referred to it by the Drafting Committee at the forty-fifth session (1993) and at the present session. 374/ The text of those articles and the commentaries thereto are reproduced in Section C.2 below.

361. In the course of the adoption of these articles, the issue was raised that the articles did not address the special situation of the developing countries directly. It was noted that the Commission intended to address that issue in a provision which might be placed in the chapter on general provisions and that would be applicable to all the articles on this topic. It was further noted that the Commission had not yet decided on whether any role should be anticipated for international organizations. If the Commission decides later to require assistance of international organizations in such matters as assessment of transboundary impact of an activity, or making notification, etc., then the relevant articles will be reconsidered.

2. The tenth report of the Special Rapporteur submitted at the present session

362. At the present session, the Commission had before it the Special Rapporteur's tenth report (A/CN.4/459) which was introduced, at the Commission's 2351st meeting held on 10 June 1994. The Commission decided to consider the report at its next session.

363. The tenth report dealt with three issues: prevention ex-post, State liability and civil liability. A summary of the tenth report as introduced by the Special Rapporteur is contained in paragraphs 5 to 20 below.

(a) Prevention ex-post

364. The Special Rapporteur recalled the discussion held in the Commission at its last session, where a substantial number of members expressed the view that prevention ex-post, namely measures adopted after the occurrence of an accident to prevent or minimize its transboundary harmful effects should not be considered as preventive measures, but instead dealt with in the context of measures of reparation. The Special Rapporteur found that view both incompatible with the approach taken in conceptualizing the topic and with the existing legal instruments dealing with similar issues. He explained that the approach to the topic followed a factual sequence; namely, an incident may

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374/ Draft articles 1, 2, 11, 12 and 14 were adopted by the Drafting Committee at the forty-fifth session in 1993.

ignite a series of cause and effect relationships which at the end may result in transboundary harm. Therefore any measure intended to prevent or intercept that chain of cause and effect relationship which would prevent or reduce the harmful transboundary effect was per se of a preventive character. It is thus clear that the concept of prevention is applicable both to measures taken to avoid incidents that can lead to transboundary harm and to measures taken to prevent the effects of the incident from reaching their full potential. This conceptualization was also supported, he pointed out, by the existing legal instruments dealing with issues of prevention and of liability of transboundary harm. He referred to a number of legal instruments dealing with prevention of environmental harm or with civil liability regimes where measures referred to were identified as preventive. 375/ The Special Rapporteur explained that if the Commission still wished to refer to preventive measures as only those taken prior to the occurrence of an accident, another term such as, for example, response measures should be used for measures of prevention ex-post since such measures cannot factually and methodologically be dealt with within the sphere of reparation.

375/ See Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of 21 June 1993, article 2 of which states in, paragraph 9: "'Preventive measures' means any reasonable measures taken by any person after an incident has occurred to prevent or minimize loss or damage as referred to in ..."; Convention on Environmental Impact Assessment in a Transboundary Context, of 25 February 1991, article 2, paragraph (1), states: "The Parties shall, ... take ... measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities."; Convention on the Transboundary Effects of Industrial Accidents of 17 March 1992 states in article 3, paragraph 1 that "The Parties shall, ..., take appropriate measures ..., to protect human beings and the environment by reducing their frequency and severity and by mitigating their effects. To this end, preventive, preparedness and response measures, including restoration measures, shall be applied."; Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources defines pollution damage in article 1, paragraph 6 as including in addition to the loss or damage outside the installation caused by contamination resulting from the escape or discharge of oil from the installation, also "the cost of preventive measures". Paragraph 7 of the same Convention defines preventive measures as "any reasonable measures taken by any person in relation to a particular incident to prevent or minimize pollution damage."; Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels uses a similar formulation in article 1, paragraphs 10 and 11 defining the concept of damage, which includes the cost of preventive measures. The United Nations Convention on the Law of Sea of 10 December 1982 also in referring to the concept of prevention in Part XII uses such wording as "prevent, reduce and control" of damage. (Emphasis added).

365. As regards who should take such response measures, the Special Rapporteur believed that it depended on the circumstances. In some situations, such measures should be taken by the State when there is a need for using massive State apparatus such as the national guards, fire-fighters, etc., in emergency situations and in some other circumstances by the private parties themselves. In the light of the foregoing, the Special Rapporteur proposed two new paragraphs to be placed in article 2 "use of terms" defining "response measures" and "damage". 376/

(b) Liability

366. The Special Rapporteur noted that his ninth report and part of his tenth report dealt with the issue of prevention, both in terms of prevention ex ante and prevention ex post. Following the recommendation of the Commission, he embarked, in the remaining part of the tenth report, on the examination of the issue of liability. Referring to the broad meaning of the concept of liability, he noted that, at this time, he did not wish to examine the content of the remedial measures, which could be other than monetary compensation. At this time, he dealt only with attribution of liability and some other aspects connected with that attribution.

(i) Relationship between State liability and civil liability

367. The report reviewed four possible ways in which a regime of State liability and civil liability could be envisaged. First, to leave the State completely out of the liability regime and provide only for civil liability of the operator. In such regimes no duty or obligation is imposed on States. An example of this type of regime, he noted, was the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment

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376/ The new paragraphs read as follows:

"Use of terms

For the purposes of the present articles:

(e) 'Response measures' means any reasonable measures taken by any person in relation to a particular incident to prevent or minimize transboundary harm.

(x) The harm referred to in subparagraph (y) includes the cost of preventive measures wherever taken, as well as any further harm that such measures may have caused."

The letters "x" and "y" represent the letters that will identify the relevant subparagraphs once article 2 has been finalized. A/CN.4/459, p. 8, para. 22.

drafted by the Council of Europe, where no obligations of prevention or otherwise were anticipated for States. Second, to make the State bear both strict liability and responsibility for the wrongful act. Here, the State becomes the only actor relevant in the entire regime. An example of this type of regime is the Convention on International Liability for Damage Caused by Space Objects where the State is absolutely liable if the damage is caused on the surface of the earth or to aircraft in flight as well as liable for damage caused due to its fault to a space object of another launching State. Third, the operator bears strict liability for damage caused, but the State also bears strict liability but only to the extent of the portion of compensation not satisfied by the private operator. In this regime, State liability is subsidiary to that of the operator. The prime examples of this type of regime are, in his opinion, the conventions for civil liability for nuclear accidents. Fourth, the operator bears strict liability for damage caused and the State bears subsidiary responsibility for the portion of compensation not satisfied by the operator, provided that the State has failed to comply with its obligation under the regime and that such failure could be linked to the damage caused. The draft protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, is an example of this type of regime. Under this draft Protocol, the private operator bears strict liability for damage, the State bears subsidiary responsibility for that portion of the damage not satisfied by the private operator. However, State responsibility in this regime is conditioned upon the proof that the State had failed to fulfil one of its obligations under the draft Protocol and that, had it not been for this failure, the damage would not have occurred. 377/

368. The Special Rapporteur viewed the first and second regimes as inappropriate for this topic. The first regime is not relevant to the present topic and the second regime which holds the State fully liable, is only justified in a convention dealing with space objects because space activities were considered by the negotiators of that convention as reserved to States. The third regime seemed appropriate for some of the activities involved in this topic where a disastrous harm might render a private operator unable to pay full compensation and therefore the subsidiary liability of a State would

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377/ See paragraphs 5 and 7 of the draft protocol, document UNEP/CHW.1/WG.1/1/3.

guarantee compensation to innocent victims. He noted that this regime could be modified to alleviate subsidiary State liability by, for example, creating a consortium of all States parties to the Convention, or private operators of the States parties to bear the subsidiary liability. As regards the fourth regime, the Special Rapporteur expressed the concern that it would be unreasonable to require the victims, often private individuals, to establish that a State has violated its obligation under the convention, since such a task usually requires access to information and the type of evidence, not easily available to private individuals.

369. The Special Rapporteur submitted two alternative forms for State liability under the regime of this topic. Under one alternative, even though he did not consider it entirely suited to the present topic, the State would bear subsidiary liability subject to two conditions: that the harm caused by the operator was due to failure of the State to comply with its obligation under the convention; and the liability of the State was limited to that portion of compensation not satisfied by the operator. 378/ The other alternative is based on the civil liability of the operator with no involvement of the State to pay compensation for transboundary harm caused by an activity. However, the State remains obligated for only failure to take

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378/ The Special Rapporteur submitted two alternatives for this situation. The alternative texts read as follows:

"State liability

Article 21

Alternative A:

Residual liability for a breach by the State

Harm which would not have occurred if the State of origin had fulfilled its obligations of prevention in respect of the activities referred to in article 1 shall entail the liability of the State of origin. Such liability shall be limited to that portion of the compensation which cannot be satisfied by applying the provisions on civil liability set forth herein.

Alternative B:

The State of origin shall in no case be liable for compensation in respect of harm caused by incidents arising from the activities referred to in article 1."

See document A/CN.4/459, p. 13, para. 30.

preventive measures and the consequences of such failure already laid down in part two of State responsibility draft articles, namely, cessation, restitution in kind, compensation, satisfaction and guarantees of non-repetition. 379/ For example, if the State of origin allows an activity within the scope of article 1 to be carried out without prior authorization, notification, etc., it would not be complying with its obligation of due diligence. If in such a case, transboundary harm occurs, the operator will be strictly liable, but the State will be responsible only for the other consequences of the breach of its due diligence obligation, i.e., responsible for its wrongful act.

(ii) Civil liability

370. The Special Rapporteur noted that international conventions on civil liability in respect of hazardous activities have, in general, imposed strict liability, primarily on the ground that the victims should promptly be compensated. The report enumerated the features common to the existing civil liability regimes: (i) the operator who bears liability is clearly identified and when there is more than one operator, their liability is joint and several; (ii) the operator is invariably obliged to take insurance or provide some financial guarantee; (iii) where possible, compensation funds are established; (iv) for the better functioning of the system, the principle of non-discrimination applies, namely the State of origin accords, in its domestic courts, to non-nationals, the same protection accorded to nationals; (v) in all matters not directly covered by the convention, the law of the competent jurisdiction applies, provided that such law is consistent with provisions of the convention; (vi) judgements enforceable in one jurisdiction are also enforceable in all other jurisdictions parties to the convention, except where otherwise provided; and (vii) monetary compensations are awarded in the currency preferred by the beneficiary of the award.

379/ The additional article reads as follows:

> "Article A
>
> International State liability
>
> The consequences of a breach by the State of origin of the obligations of prevention laid down in these articles shall be those consequences established by international law for the breach of international obligations."

See document A/CN.4/459, p. 17, para. 41.

a. Liability of the operator

371. One of the important characteristics of civil liability regimes, the Special Rapporteur noted, is the clear identification of the party who will bear the liability for any harm caused. This clarity has the advantage of not only putting the potentially liable parties on notice and making them do their best to avoid causing harm, but it also facilitates redress of the injured party, in case of harm. He stated that a review of civil liability regimes shows that, in general, liability is channelled through the operator, on the grounds that the operator: (a) is in control of the activity; (b) is in the best position to avoid causing harm; and (c) is the primary beneficiary of the operation and should therefore bear the cost of the operation to others. Inspired by the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment which is perhaps the most relevant to this topic because of its general character, the Special Rapporteur proposed provisions for defining the operator and its liability. Accordingly, the operator is the person who has "control" over the activity. The operator bears liability for the significant transboundary harm caused by its activity during the period in which he exercises control over the activity. If there is more than one operator, liability is joint and several unless the operator proves that he has been liable only for part of the harm, in which case he will be liable only for that part of the harm. 379a/

379a/ The texts proposed by the Special Rapporteur read as follows:

"Article 2

Use of terms

...

(...) 'Operator' means the person who exercises the control of an activity referred to in article 1.

...

Article A

Liability of the operator

The operator of an activity referred to in article 1 shall be liable for all significant transboundary harm caused by such activity.

(a) In the case of continuous occurrences, or a series of occurrences having the same origin, operators liable under the paragraph above shall be held jointly and severally liable.

b. Obligation to purchase insurance

372. Relying on existing civil liability conventions, the Special Rapporteur proposed provisions requiring financial guarantee of the operator conducting activities covered by this topic. 380/ These provisions would leave it up to the States of origin to determine through their domestic law how and for what amount financial guarantees should be made. Some States may require

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(b) Where the operator proves that during the period of the commission of the continuous occurrence in respect of which he is liable only a part of the damage was caused, he shall be liable for that part.

(c) Where the operator proves that the occurrence in a series of occurrences having the same origin for which he is liable had caused only a part of the damage, he shall be held liable for that part.

Article B

Recourse against third parties

No provision of these articles shall restrict the right of recourse which the law of the competent jurisdiction grants to the operator against any third party."

Ibid., p. 22 paras. 56-57.

380/ The texts proposed by the Special Rapporteur read as follows:

"Article C

Financial securities or insurance

In order to cover the liability provided for in these articles, States of origin shall, where appropriate, require operators engaged in dangerous activities in their or otherwise under their jurisdiction or control to participate in a financial security scheme or to provide other financial guarantees within such limits as shall be determined by the authorities of such States, in accordance with the assessment of the risk involved in the activity in question and the conditions established in their internal law.

Article D

Action brought directly against an insurer or financial guarantor

An action for compensation may be brought directly against the insurer or another person who has provided the financial security referred to in the article above."

Ibid., p. 24, para. 61.

purchase of insurance, while others may set up other financial schemes in which the operators would participate. The amount of such guarantee would be determined by the State of origin depending upon the risk an activity may pose. Where there are financial guarantors, claims for compensation may be brought directly against them.

c. Competent court

373. The Special Rapporteur noted that various jurisdictions have been identified in the existing civil liability conventions as competent to deal with claims. Those jurisdictions include the courts of the place: (a) where the harm occurs; (b) where the operator resides; (c) where the injured party resides; or (d) where preventive measures were supposed to have been taken. Each of these jurisdictions had advantages in terms of gathering evidence and convenience of the claimant or the defendant. Accordingly, the text he proposed would provide only for the first three jurisdictions. 381/

d. Non-discrimination

374. The Special Rapporteur noted that in order for civil liability regimes to be effective, the appropriate jurisdictions should grant equal treatment before the law between nationals and non-nationals or residents and non-residents. Therefore, States parties might have to remove any obstacles which might lead to such discrimination. Such a provision, in his view, is necessary for these articles as well. He stated that the principle established by article 10 on non-discrimination may be considered by the

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381/ The text proposed by the Special Rapporteur reads as follows:

> "Competent court
>
> Actions for compensation of damages attaching to the civil liability of the operator may be brought only in the competent courts of a State party that is either the affected State, the State of origin or the State where the liable operator has his domicile or residence or principal place of business."

See document A/CN.4/459, p. 25, para. 64.

Commission to be sufficient to satisfy this condition. If not, a specific article with similar drafting could be included in this part of the articles. 382/

e. Causality

375. Following the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, the report proposed that a court, when considering evidence of a causal link between activities and consequences, must take due account of the increased danger of damage inherent to a specific activity. The article proposed in the report, however, does not create a presumption of causality between the incident and harm. 383/

f. Enforcement of judgments

376. One of the elements essential in any effective civil liability regime is the possibility to have the judgment rendered in one jurisdiction enforced in another jurisdiction. Otherwise, the effort of a private party to seek redress in domestic courts could be futile. That is the reason for the existence of a provision on enforcement of judgments in the existing civil

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382/ The text proposed by the Special Rapporteur reads as follows:

"Article E

Domestic remedies

The Parties shall provide in their domestic law for judicial remedies that allow for prompt and adequate compensation or other relief for the harm caused by the activities referred to in article 1.

Article F

Application of national law

The competent courts shall apply their national law in all matters of substance or procedure not specifically dealt with in these articles."

Ibid., p. 26, para. 67.

383/ The text of the article proposed by the Special Rapporteur reads as follows:

"Article H

When considering evidence of the causal link between the incident and the harm, the court shall take due account of the increased danger of causing such harm inherent in the dangerous activity."

See document A/CN.4/459, p. 28, para. 70.

liability conventions. However, some exceptions are provided. They include, for example, fraud, violation of procedural fairness, namely when the party against whom the judgment was rendered was not given sufficient notice to prepare for defence; and a judgment against the public policy of the State where enforcement is sought. These provisions require that the party seeking enforcement must comply with the procedural laws of the State in question for such enforcement. On the basis of the foregoing the Special Rapporteur proposed a provision on enforcement of judgments. 384/

g. Exceptions to liability

377. Grounds for exceptions to liability, in the existing civil liability conventions, depend upon their subject-matter and the extent of the risk they pose to others and to the environment. The following have been identified as grounds of exceptions to liability: armed conflict; unforeseeable natural phenomenon of exceptional and irresistible character; a result of the wrongful and intentional act of a third party; and gross negligence of the injured party. In the view of the Special Rapporteur, these grounds are equally

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384/ The text of the proposed article reads as follows:

"Article I

Enforceability of the judgment

1. Where the final judgments entered by the competent court are enforceable under the laws applied by such court, they shall be recognized in the territory of any other Contracting Party unless:

(a) The judgment was obtained by fraud;

(b) Reasonable advance notice of the claim to enable the defendant to present his case under appropriate conditions was not given;

(c) The judgment was contrary to the public policy of the State in which recognition is sought, or did not accord with the fundamental standards of justice;

(d) The judgment was irreconcilable with an earlier judgement given in the State in which recognition is sought on a claim on the same subject and between the same parties.

2. A judgment recognized under the paragraph above shall be enforced in any of the Member States as soon as the formalities required by the Member State in enforcement is being sought have been met. No further review of the merits of the case shall be permitted."

See document A/CN.4/459, p. 30, para. 76.

reasonable as exceptions to liability in respect of the type of activities covered by this topic and accordingly he proposed an article on exceptions. 385/ As regards exceptions to State responsibility for wrongful acts, namely non-compliance with preventive provisions, the grounds for exception are those contained in Part One of the draft articles on State responsibility.

h. Statute of limitations

378. Various timetables are provided for in different civil liability conventions to serve as statutes of limitations. They run from one year, under the Convention on International Liability for Damage Caused by Space Objects, to 10 years under the 1963 Vienna Convention on Civil Liability for Nuclear Damage. These timetables were set on the basis of various considerations such as, for example, the time within which harm may become visible and identifiable, the time that might reasonably be necessary to establish a casual relationship between harm and a particular activity, etc. In the view of the Special Rapporteur, since the type of activities covered by this topic were more similar to those covered by the Convention on Civil Liability Resulting from Activities Dangerous to the Environment, the three

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385/ The text of the proposed article reads as follows:

"Article J

Exceptions

1. The operator shall not be liable:

(a) If the harm was directly attributable to an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(b) If the harm was wholly caused by an act or omission done with the intent to cause harm by a third party.

2. If the operator proves that the harm resulted wholly or partially either from an act or omission by the person who suffered the harm, or from the negligence of that person, the operator may be exonerated wholly or partially from his liability to such person."

Ibid., p. 34, para. 83.

year statute of limitations provided therein would also be appropriate in respect of claims for compensation under this topic. In no case may a procedure be instituted after 30 years from the date of the accident. Accordingly, he proposed an article to that effect. 386/ The article would also take into account whether the activity is of a continuous nature or consists of a series of activities. In his view, the three year statute of limitations should apply to both State and operator liability.

(c) Procedural channels

379. The type of controversies which may arise in respect of the activities covered by these articles will, in most cases, place an individual against a State. For example, if the regime of liability provides for a subsidiary liability of the State, the State may have to appear before the court of another State to defend itself. The report reviewed various possibilities, but found most appropriate the proposal by the Netherlands in the International Atomic Energy Agency Standing Committee to the effect of creating a single forum like a mixed claims commission where all kinds of claims involving States and private individuals could be heard and adjudicated.

386/ The text of the proposed article reads as follows:

"Article K

Time-limits

> Proceedings in respect of liability under these articles shall lapse after a period of three years from the date on which the claimant learned, or could reasonably have been expected to have learned, of the harm and of the identity of the operator or of the State of origin in the case of State liability. No proceedings may be instituted once 30 years have elapsed since the date of the incident which caused the harm. Where the incident consisted of a continuous occurrence, the periods in question shall run from the date on which the incident began and where it consisted of a series of occurrences having the same origin, the periods in question shall run from the date of the last occurrence."

See document A/CN.4/459, p. 36, para. 88.

C. Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law

1. Text of the draft articles provisionally adopted by the Commission so far on first reading

380. The text of the draft articles provisionally adopted so far by the Commission are reproduced below.

[CHAPTER I. GENERAL PROVISIONS]*

Article 1

Scope of the present articles

The present articles apply to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which involve a risk of causing significant transboundary harm through their physical consequences.

Article 2

Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(c) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out.

* * *

[CHAPTER II. PREVENTION]*

Article 11**

Prior authorization

States shall ensure that activities referred to in article 1 are not carried out in their territory or otherwise under their jurisdiction or control without their prior authorization. Such authorization shall also be required in case a major change is planned which may transform an activity into one referred to in article 1.

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* Designation of the chapter is provisional.

** The present numbering is provisional and follows that proposed by the Special Rapporteur in his reports.

Article 12

Risk assessment

Before taking a decision to authorize an activity referred to in article 1, a State shall ensure that an assessment is undertaken of the risk of such activity. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as in the environment of other States.

Article 13

Pre-existing activities

If a State, having assumed the obligations contained in these articles, ascertains that an activity involving a risk of causing significant transboundary harm is already being carried out in its territory or otherwise under its jurisdiction or control without the authorization as required by article 11, it shall direct those responsible for carrying out the activity that they must obtain the necessary authorization. Pending authorization, the State may permit the continuation of the activity in question at its own risk.

Article 14*

Measures to prevent or minimize the risk

States shall take legislative, administrative or other actions to ensure that all appropriate measures are adopted to prevent or minimize the risk of transboundary harm of activities referred to in article 1.

Article 14 bis [20 bis]

Non-transference of risk

In taking measures to prevent or minimize a risk of causing significant transboundary harm, States shall ensure that the risk is not simply transferred, directly or indirectly, from one area to another or transformed from one type of risk into another.

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* The expression "prevent or minimize the risk" of transboundary harm in this and other articles will be reconsidered in the light of the decision by the Commission as to whether the concept of prevention includes, in addition to measures aimed at preventing or minimizing the risk of occurrence of an accident, measures taken after the occurrence of an accident to prevent or minimize the harm caused.

Article 15

Notification and information

1. If the assessment referred to in article 12 indicates a risk of causing significant transboundary harm, the State of origin shall notify without delay the States likely to be affected and shall transmit to them the available technical and other relevant information on which the assessment is based and an indication of a reasonable time within which a response is required.

2. Where it subsequently comes to the knowledge of the State of origin that there are other States likely to be affected, it shall notify them without delay.

Article 16

Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all information relevant to preventing or minimizing the risk of causing significant transboundary harm.

Article 16 bis

Information to the public

States shall, whenever possible and by such means as are appropriate, provide their own public likely to be affected by an activity referred to in article 1 with information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Article 17

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Article 18

Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them and without delay, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of causing significant transboundary harm, and cooperate in the implementation of these measures.

2. States shall seek solutions based on an equitable balance of interests in the light of article 20.

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution the State of origin shall nevertheless take into account the interests of States likely to be affected and may proceed with the activity at its own risk, without prejudice to the right of any State withholding its agreement to pursue such rights as it may have under these articles or otherwise.

Article 19

Rights of the State likely to be affected

1. When no notification has been given of an activity conducted in the territory or otherwise under the jurisdiction or control of a State, any other State which has serious reason to believe that the activity has created a risk of causing it significant harm may require consultations under article 18.

2. The State requiring consultations shall provide technical assessment setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1, the State requiring consultations may claim an equitable share of the cost of the assessment from the State of origin.

Article 20

Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 18, the States concerned shall take into account all relevant factors and circumstances, including:

(a) the degree of risk of significant transboundary harm and the availability of means of preventing or minimizing such risk or of repairing the harm;

(b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) the risk of significant harm to the environment and the availability of means of preventing or minimizing such risk or restoring the environment;

(d) the economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(e) the degree to which the States likely to be affected are prepared to contribute to the costs of prevention;

(f) the standards of protection which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

2. Text of draft articles 1, 2 (paras. (a), (b) and (c)), 11 to 14 bis [20 bis], 15 to 16 bis and 17 to 20 with commentaries thereto provisionally adopted by the Commission at its forty-sixth session

381. The text of draft articles 1, 2 (paras. (a), (b) and (c)), 11 to 14 *bis* [20 *bis*], 15 to 16 *bis* and 17 to 20 with commentaries thereto provisionally adopted by the Commission at its forty-sixth session are reproduced below.

General Commentary

(1) The present science-based civilization is marked by the increasingly intensive use in many different forms of resources of the planet for economic, industrial or scientific purposes. Furthermore, the scarcity of natural resources, the need for the more efficient use of resources, the creation of substitute resources and the ability to manipulate organisms and micro-organisms have led to innovative production methods, sometimes with unpredictable consequences. Because of economic and ecological interdependence, activities involving resource use occurring within the territory, jurisdiction or control of a State may have an injurious impact on other States or their nationals. This factual aspect of global interdependence has been demonstrated by events that have frequently resulted in injuries beyond the territorial jurisdiction or control of the State where the activity was conducted. The frequency with which activities permitted by international law, but having transboundary injurious consequences, are undertaken, together with scientific advances and greater appreciation of the extent of their injuries and ecological implications dictate the need for some international regulation in this area.

(2) The legal basis for establishing international regulation in respect of these activities has been articulated in State practice and judicial decisions, notably by the International Court of Justice in the *Corfu Channel* case in which the Court observed that there were "general and well-recognized principles" of international law concerning "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." 387/ The *Trail Smelter* Tribunal reached a similar conclusion when it stated that, "under the principles of international law, as

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387/ *Corfu Channel Case (Merits) (United Kingdom/Albania)*, *I.C.J. Reports*, p. 22, 1949.

well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." 388/

(3) Principle 21 of the Stockholm Declaration on the Human Environment is also in support of the principle that "States have ... the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." 389/ Principle 21 was reaffirmed in General Assembly resolutions: resolution 2995 (XXVII) of 15 December 1972 on Cooperation between States in the Field of Environment, 390/ resolution 3129 (XXVIII) of 13 December 1973 on Cooperation in the Field of the Environment concerning Natural Resources Shared by Two or More States, 391/ and resolution 3281 (XXIX) of 12 December 1974 adopting the Charter of Economic Rights and Duties of States, 392/ and by Principle 2 of the Rio Declaration on Environment and Development. 393/ In addition paragraph 1 of General Assembly resolution 2995 (XXVII) further clarified Principle 21 of the Stockholm Declaration where it stated that "in the exploration, exploitation and development of their natural resources, States must not produce significant harmful effects in zones situated outside their national jurisdiction". 394/ Support of this principle is also found in

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388/ Trail Smelter Case, United Nations, Reports of International Arbitral Awards, vol. 3, p. 1965, (1949).

389/ Document A/CONF.48/Rev.1.

390/ General Assembly Official Records: Twenty-seventh Session, Supp. No. 30 (A/8730), p. 42.

391/ Ibid., Twenty-eighth Session, Supp. No. 30, (A/9030), p. 48.

392/ Ibid., Twenty-ninth Session, Supp. No. 30, (A/9631), p. 50, see in particular arts. 2, 30 and 32 (2).

393/ Document A/CONF.151/26/Rev.1 (vol. I), p. 3.

394/ See supra note 390.

UNEP Principles of the Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared Between Two or More States 395/ and in a number of OECD Council Recommendations. 396/ The draft articles follow the well-established principle of sic utere tuo ut alienum non laedas (use your own property so as not to injure the property of another) in international law. As Lauterpacht stated this maxim "is applicable to relations of States not less than those of individuals; ... it is one of those general principles of law ... which the Permanent Court is bound to apply by virtue of Article 38 of its Statute." 397/

(4) The judicial pronouncements and doctrine and pronouncements by international and regional organizations together with non-judicial forms of State practice provide sufficient basis for the following articles which are intended to set a standard of behaviour in relation to the conduct and the effect of undertaking activities which are not prohibited by international law but could have transboundary injurious consequences. The articles elaborate, in more detail, the specific obligations of States in that respect. They recognize the freedom of States in utilizing their resources within their own territories but in a way not to cause significant harm to other States.

(5) The Commission decided in 1992 to approach the topic in stages. The first stage deals with issues of preventing transboundary harm of activities with a risk of such harm. The following articles are designed to deal only with that particular issue.

395/ United Nations document UNEP/IG 12/2 (1978) reproduced in International Legal Materials, vol. 17, p. 1097.

396/ See 1974 OECD Council Recommendation c (74) 224 concerning Transfrontier Pollution (Annex title B), OECD, OECD and the Environment, 1986, p. 142; 1974 Recommendation c (74) 220 on the Control of Eutrophication of Waters, ibid., p. 44; and 1974 Recommendation c (74) 221 on Strategies for Specific Water Pollutants Control, ibid., p. 45.

397/ Oppenheim, International Law (8th ed. by H. Lauterpacht, 1955), pp. 346-347.

[CHAPTER I. GENERAL PROVISIONS]*

Article 1

Scope of the present articles

> The present articles apply to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which involve a risk of causing significant transboundary harm through their physical consequences.

Commentary

(1) Article 1 defines the scope of the articles designed specifically to deal with measures to be taken in order to prevent transboundary harm of activities with a risk of such harm.

(2) Article 1 limits the scope of the articles to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State, and which involve a risk of causing significant transboundary harm through their physical consequences. The Commission is aware that additional criteria are necessary to determine with more precision the type of activities within the scope of these articles. It, therefore, intends to consider the issue at a later stage and recommend either a provision defining the activities falling within the scope of these articles or a provision listing such activities or certain quality of such activities. This definition of scope now contains four criteria.

(3) The first criterion refers back to the title of the topic, namely that the articles apply to "activities not prohibited by international law". [398] It emphasizes the distinction between the scope of this topic and that of the topic of State responsibility which deals with "internationally wrongful acts".

(4) The second criterion is that the activities to which preventive measures are applicable are "carried out in the territory or otherwise under the

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* The designation of the Chapter is provisional.

[398] The Commission has not yet changed in the title of the topic the word "acts" by "activities". The Commission's choice of the word "activities" in the articles is on the basis of the recommendation of the Working Group set up by the Commission in 1992 that "the Commission decided to continue with its working hypothesis that the topic deal with 'activities'". See Official Records of the General Assembly, Forty-seventh Session, Supp. No. 10, (A/47/10), para. 348.

jurisdiction or control of a State". Three concepts are used in this criterion: "territory", "jurisdiction" and "control". Even though the expression "jurisdiction or control of a State" is a more commonly used formula in some instruments, 399/ the Commission finds it useful to mention also the concept of "territory" in order to emphasize the importance of the territorial link, when such a link exists, between activities under these articles and a State.

(5) For the purposes of these articles, "territory" refers to areas over which a State exercises its sovereign authority. The Commission draws from past State practice, whereby a State has been held responsible for activities, occurring within its territory, which have injurious extra-territorial effects. In Island of Palmas, Max Huber, the sole arbitrator, stated that "sovereignty" consists not entirely of beneficial rights. A claim by a State to have exclusive jurisdiction over certain territory or events supplemented with a demand that all other States should recognize that exclusive jurisdiction has a corollary. It signals to all other States that the sovereign State will take account of the reasonable interests of all other States regarding events within its jurisdiction by minimizing or preventing injuries to them and will accept responsibility if it fails to do so:

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as the corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations." 400/

399/ See, for example, Principle 21 of the Stockholm Declaration, Report of the Stockholm Conference, United Nations document A/CONF.48/14; the 1982 United Nations Convention on the Law of the Sea, United Nations document A/CONF.62/122, art. 194, para. 2; Principle 2 of the Rio Declaration, United Nations document A/CONF.151/26 (vol. I) p. 3; and Article 3 of the United Nations Convention on Biological Diversity of 5 June 1992, document DPI/1307.

400/ United Nations, Reports of International Arbitral Awards, vol. 2, p. 838.

(6) Judge Huber then emphasized the obligation which accompanies the sovereign right of a State:

> "Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has, as corollary, a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e., to excluding the activities of other States; for it serves to provide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian." 401/

(7) The Corfu Channel is another case in point. There, the International Court of Justice held Albania responsible, under international law, for the explosions which occurred in its waters and for the damage to property and human life which resulted from those explosions to British ships. The Court, in that case, relied on international law as opposed to any special agreement which might have held Albania liable. The Court said:

> "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of the minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on The Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war, the principle of the freedom of maritime communications, and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." 402/

(8) Although the Court did not specify how "knowingly" should be interpreted where a State is expected to exercise its jurisdiction, it drew certain conclusions from the exclusive display of territorial control by the State. The Court stated that it would be impossible for the injured party to establish that the State had knowledge of the activity or the event which would cause injuries to other States, because of exclusive display of control by the territorial State. The Court said:

401/ Ibid., p. 839.

402/ I.C.J. Reports, 1949, p. 22.

> "On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has its bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of facts and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion." 403/

(9) In the Trail Smelter, the Tribunal referred to the corollary duty accompanying territorial sovereignty. In that case, although the Tribunal was applying the obligations created by a treaty between the United States and the Dominion of Canada and had reviewed many of the United States cases, it made a general statement which the Tribunal believed to be compatible with the principles of international law. The Tribunal held: "under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons herein, when the case is of serious consequence and the injury is established by clear and convincing evidence." 404/ The Tribunal quoted Professor Eagleton to the effect that "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction," and noted that international decisions, from the Alabama onward, are based on the same general principle. 405/

(10) In the Lake Lanoux award, the Tribunal alluded to the principle prohibiting the upper riparian State from altering waters of a river if it would cause serious injury to other riparian States:

> "Thus, while admittedly there is a rule prohibiting the upper riparian State from altering the waters of a river in circumstance calculated to do serious injury to the lower riparian State, such a principle has no

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403/ Ibid., p. 18.

404/ United Nations, Reports of International Arbitral Awards, vol. 3, p. 1965.

405/ United Nations, International Arbitral Awards, vol. 3, p. 1963, C. Eagleton, Responsibility of States in International Law, 1928, p. 80.

> application to the present case, since it was agreed by the Tribunal ... that the French project did not alter the waters of the Carol." 406/

(11) Other forms of State practice have also supported the principle upheld in the judicial decisions mentioned above. For example, in 1892 in a border incident between France and Switzerland, the French Government decided to halt the military target practice exercise near the Swiss border until steps had been taken to avoid accidental transboundary injury. 407/ Also following an exchange of notes, in 1961, between the United States and Mexico concerning two United States companies, *Payton Packing* and *Casuco* located on the Mexican border, whose activities were prejudicial to Mexico, the two companies took substantial measures to ensure that their operations ceased to inconvenience the Mexican border cities. 408/ Those measures included phasing out certain activities, changing working hours and establishing systems of disinfection. 409/ In 1972, Canada invoked the *Trail Smelter* principle against the United States when an oil spill at Cherry Point, Washington resulted in a contamination of beaches in British Columbia. 410/ There are a number of other examples of State practice along the same line. 411/

406/ *Lake Lanoux* Arbitration (France-Spain), United Nations, *Reports of International Arbitral Awards*, vol. 12, p. 281.

407/ P. Guggenheim, "La pratique suisse (1956)", *Annuaire suisse de droit international*, 1957 (Zurich), vol. XIV, p. 168.

408/ M. M. Whiteman, ed., *Digest of International Law* (Washington D.C.), vol. 6, pp. 258-259.

409/ Ibid.

410/ *See Canadian Yearbook of International Law*, vol. 11, pp. 333-334, 1973. The Trail Smelter principle was applied also by the District Court of Rotterdam in the Netherlands in a case against *Mines Domaniales de Potasse d'Alsace*. See J.G. Lammers, *Pollution of International Watercourses*, p. 198 (1984).

411/ In Dukovany, in former Czechoslovakia, two Soviet-designed 440 megawatt electrical power reactors were scheduled to be operating by 1980. The closeness of the location to the Austrian border led to a demand by the Austrian Ministry for Foreign Affairs for talks with Czechoslovakia about the safety of the facility. This was accepted by the Czechoslovak Government. *Osterreichische Zeitschrift fur Aussenpolitik*, vol. 15, p. 1 cited in G. Handl, "Conduct of abnormally dangerous activities in frontier areas: The case of nuclear power plant siting", *Ecology Law Quarterly*, Berkeley Cal. vol. 7, 1978, p. 1. In 1973, the Belgian Government announced its intention

(12) Principle 21 of the Stockholm Declaration on the Human Environment 412/ and Principle 2 of the Rio Declaration on Environment and Development 413/ prescribe principles similar to Trail Smelter and Corfu Channel.

(13) The use of the term "territory" in article 1 stems from concerns about a possible uncertainty in contemporary international law as to the extent to which a State may exercise extraterritorial jurisdiction in respect of certain activities. It is the view of the Commission that, for the purposes of these articles, territorial jurisdiction is the dominant criterion. Consequently, when an activity occurs within the territory of a State, that State must comply with the preventive measures obligations. "Territory" is, therefore, taken as conclusive evidence of jurisdiction. Consequently, in cases of competing jurisdictions over an activity covered by these articles, the territorially-based jurisdiction prevails. The Commission, however, is mindful of situations, where a State, under international law, has to yield jurisdiction within its territory to another State. The prime example of such a situation is innocent passage of a foreign ship through territorial sea or territorial waters. In such situations, if the activity leading to a

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to construct a refinery at Lanaye, near its frontier with the Netherlands. The Netherlands Government voiced its concern because the project threatened not only the nearby Netherlands national park but also other neighbouring countries. It stated that it was an established principle in Europe that, before the initiation of any activities that might cause injury to neighbouring States, the acting State must negotiate with those States. The Netherlands Government appears to have been referring to an existing or expected regional standard of behaviour. Similar concern was expressed by the Belgian Parliament, which asked the Government how it intended to resolve the problem. The Government stated that the project had been postponed and that the matter was being negotiated with the Netherlands Government. The Belgian Government further assured Parliament that it respected the principles set out in the Benelux accords, to the effect that the parties should inform each other of those of their activities that might have harmful consequences for the other member States. Belgium Parliament, Questions et réponses bulletin, 19 July 1973.

412/ See Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, Doc.A/CONF.48/Rev. 1.

413/ See Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Doc. A/CONF.151/26 (Vol. I).

significant transboundary harm emanates from the foreign ship, the flag State and not the territorial State must comply with the provisions of the present articles.

(14) The Commission is aware that the concept of "territory" for the purposes of these articles is narrow and therefore the concepts of "jurisdiction" and "control" are also used.

(15) The expression "jurisdiction" of a State is intended to cover, in addition to the activities being undertaken within the territory of a State, activities over which, under international law, a State is authorized to exercise its competence and authority. The Commission is aware that questions involving the determination of jurisdiction are complex and sometimes constitute the core of a dispute. This article certainly does not presume to resolve all the questions of conflicts of jurisdiction.

(16) Sometimes due to the location of the activity, there is no territorial link between a State and the activity such as, for example, activities taking place in outer space or on the high seas. The most common example is the jurisdiction of the flag State over a ship. The Geneva Conventions on the Law of the Sea and the United Nations Convention on the Law of the Sea have covered many jurisdictional capacities of the flag State.

(17) Activities may also be undertaken in places where more than one State is authorized, under international law, to exercise particular jurisdictions that are not incompatible. The most common areas where there are functional mixed jurisdictions are the navigation and passage through the territorial sea, contiguous zone and exclusive economic zones. In such circumstance, the State which is authorized to exercise jurisdiction over the activity covered by this topic must, of course, comply with the provisions of these articles.

(18) In cases of concurrent jurisdiction by more than one State over the activities covered by these articles, States shall individually and, when appropriate, jointly comply with the provisions of these articles.

(19) The Commission takes note of the function of the concept of "control" in international law, which is to attach certain legal consequences to a State whose jurisdiction over certain activities or events is not recognized by international law; it covers situations in which a State is exercising de facto jurisdiction, even though it lacks jurisdiction *de jure*, such as in cases of intervention, occupation and unlawful annexation which have not been recognized in international law. The Commission relies, in this respect, on the advisory opinion by the International Court of Justice in

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970). 414/ In that case, the Court, after holding South Africa responsible for having created and maintained a situation which the Court declared illegal and finding South Africa under an obligation to withdraw its administration from Namibia, nevertheless attached certain legal consequences to the de facto control of South Africa over Namibia. The Court held:

> "The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States." 415/

(20) The concept of control may also be used in cases of intervention to attribute certain obligations to a State which exercises control as opposed to jurisdiction. Intervention here refers to a short-time effective control by a State over events or activities which are under jurisdiction of another State. It is the view of the Commission that in such cases, if the jurisdictional State demonstrates that it had been effectively ousted from the exercise of its jurisdiction over the activities covered by these articles, the controlling State would be held responsible to comply with the obligations imposed by these articles.

(21) The third criterion is that activities covered in these articles must involve a "risk of causing significant transboundary harm". The term is defined in article 2 (see commentary to art. 2). The element of risk is intended to limit the scope of the topic, at this stage of the work, to activities with risk and, consequently exclude from the scope activities which, in fact, cause transboundary harm in their normal operation, such as, for example creeping pollution. The words "transboundary harm" are intended to exclude activities which cause harm only in the territory of the State within which the activity is undertaken or those activities which harm the so-called global commons per se but without any harm to any other State.

414/ I.C.J. Reports, 1971, p. 14.

415/ Ibid., para. 118.

(22) The fourth criterion is that the significant transboundary harm must have been caused by the "physical consequences" of such activities. It was agreed by the Commission that in order to bring this topic within a manageable scope, it should exclude transboundary harm which may be caused by State policies in monetary, socio-economic or similar fields. The Commission feels that the most effective way of limiting the scope of these articles is by requiring that these activities should have transboundary physical consequences which, in turn, result in significant harm.

(23) The physical link must connect the activity with its transboundary effects. This implies a connection of a very specific type - a consequence which does or may arise out of the very nature of the activity or situation in question, in response to a natural law. That implies that the activities covered in these articles must themselves have a physical quality, and the consequences must flow from that quality, not from an intervening policy decision. Thus, the stockpiling of weapons does not entail the consequence that the weapons stockpiled will be put to a belligerent use. Yet this stockpiling may be characterized as an activity which, because of the explosive or incendiary properties of the materials stored, entails an inherent risk of disastrous misadventure.

Article 2

Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(c) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out.

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Commentary

(1) Paragraph (a) defines the concept of "risk of causing significant transboundary harm" as encompassing a low probability of causing disastrous

harm and a high probability of causing other significant harm. The Commission feels that instead of defining separately the concept of "risk" and then "harm", it is more appropriate to define the expression "risk of causing significant transboundary harm" because of the interrelationship between "risk" and "harm" and the relationship between them and the adjective "significant".

(2) For the purposes of these articles, "risk of causing significant transboundary harm" refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact. It is, therefore, the combined effect of "risk" and "harm" which sets the threshold. In this respect the Commission drew inspiration from the Code of Conduct on Accidental Pollution of Transboundary Inland Waters, 416/ adopted by the Economic Commission for Europe in 1990. Under article 1, paragraph (f), of the Code of Conduct, "'risk' means the combined effect of the probability of occurrence of an undesirable event and its magnitude;". It is the view of the Commission that a definition based on the combined effect of "risk" and "harm" is more appropriate for these articles, and that the combined effect should reach a level that is deemed significant. The prevailing view in the Commission is that the obligations of prevention imposed on States should be not only reasonable but also sufficiently limited so as not to impose such obligations in respect of virtually any activity, for the activities under discussion are not prohibited by international law. The purpose is to strike a balance between the interests of the States concerned.

(3) The definition in the preceding paragraph allows for a spectrum of relationships between "risk" and "harm", all of which would reach the level of "significant". The definition identifies two poles within which the activities under these articles will fall. One pole is where there is a low probability of causing disastrous harm. This is normally the characteristic of ultrahazardous activities. The other pole is where there is a high probability of causing other significant harm. This includes activities which have a high probability of causing harm which, while not disastrous, is still significant. But it would exclude activities where there is a very low probability of causing significant transboundary harm. The word

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416/ Doc. E/ECE/1225 - ECE/ENVWA/16.

"encompasses" in the second line is intended to highlight the intention that the definition is providing a spectrum within which the activities under these articles will fall.

(4) As regards the meaning of the word "significant", the Commission is aware that it is not without ambiguity and that a determination has to be made in each specific case. It involves more factual considerations than legal determination. It is to be understood that "significant" is something more than "detectable" but need not be at the level of "serious" or "substantial". The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards.

(5) The ecological unity of the Planet does not correspond to political boundaries. In carrying out lawful activities within their own territories States have impacts on each other. These mutual impacts, so long as they have not reached the level of "significant", are considered tolerable. Considering that the obligations imposed on States by these articles deal with activities that are not prohibited by international law, the threshold of intolerance of harm cannot be placed below "significant".

(6) The idea of a threshold is reflected in the Trail Smelter award which used the words "serious consequences", 417/ as well as the Lake Lanoux Tribunal which relied on the concept "seriously" (gravement). 418/ A number of conventions have also used "significant", "serious" or "substantial"

417/ United Nations, Reports of International Arbitral Awards, vol. 3, p. 1965.

418/ Ibid., vol. 12, p. 308.

as the threshold. 419/ "Significant" has also been used in other legal instruments and domestic laws. 420/

(7) The Commission is also of the view that the term "significant", while determined by factual and objective criteria, also involves a value determination which depends on the circumstances of a particular case and the period in which such determination is made. For instance, a particular deprivation, at a particular time might not be considered "significant" because at that specific time, scientific knowledge or human appreciation for a particular resource had not reached a point at which much value was ascribed to that particular resource. But some time later that view might change and the same harm might then be considered "significant".

(8) Paragraph (b) defines "transboundary harm" as meaning harm caused in the territory of or in places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common

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419/ See, for example, art. 4 (2) of the Convention on the Regulation of Antarctic Mineral Resource Activities adopted on 2 June 1988, International Legal Materials, vol. 28, p. 868; art. 2 (1) and (2) of the Convention on Environmental Impact Assessment in a Transboundary Context adopted on 25 February 1991 (E/ECE/1250), reprinted in International Legal Materials, vol. 30, p. 800; art. I (b) of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters adopted in 1990 (E/ECE/1225).

420/ See, for example, operative paras. 1 and 2 of General Assembly resolution 2995 (XXVII) of 15 December 1972 Concerning cooperation between States in the field of the Environment, General Assembly Official Records: Twenty-seventh Session, Supp. No. 30, p. 42 (1973); Recommendation of the Council of the Organization for Economic Co-operation and Development on Principles Concerning Transfrontier Pollution, 1974, para. 6, OECD, Non-Discrimination in Relations to Transfrontier Pollution: Leading OECD Documents, p. 35, (1978), reproduced also in International Legal Materials, vol. 14, p. 246, (1975); The Helsinki Rules on the Uses of the Waters of International Rivers, art. 10, International Law Association, Report of the fifty-second Conference, Helsinki, 1966, p. 496; and art. 5 of the draft Convention on industrial and agricultural use of international rivers and lakes, prepared by the Inter-American Juridical Committee in 1965, OAS, Rios y Lagos Internacionales, p. 132 (4th ed. 1971).

See also the 1980 Memorandum of Intent Concerning Transboundary Air Pollution between the United States and Canada, 32 U.S.T., p. 2541, T.I.A.S. No. 9856; and the 1983 Mexico-United States Agreement to Cooperate in the Solution of Environmental Problems in the Border Area, art. 7, in International Legal Materials, vol. 22, p. 1025 (1983).

The United States has also used the word "significant" in its domestic law dealing with environmental issues. See the American Law Institute, Restatement of the Law, Section 601, Reporter's Note 3, pp. 111-112.

border. This definition includes, in addition to a typical scenario of an activity within a State with injurious effects on another State, activities conducted under the jurisdiction or control of a State, for example, on the high seas, with effects on the territory of another State or in places under its jurisdiction or control. It includes, for example, injurious impacts on ships or platforms of other States on the high seas as well. It will also include activities conducted in the territory of a State with injurious consequences on, for example, the ships or platforms of another State on the high seas. The Commission cannot forecast all the possible future forms of "transboundary harm". It, however, makes clear that the intention is to be able to draw a line and clearly distinguish a State to which an activity covered by these articles is attributable from a State which has suffered the injurious impact. Those separating boundaries are the territorial boundaries, jurisdictional boundaries and control boundaries. Therefore, the term "transboundary" in "transboundary harm" should be understood in the context of the expression "within its territory or otherwise under its jurisdiction or control" used in article 1.

(9) In paragraph (c), the term "State of origin" is introduced to refer to the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out (see commentary to art. 1, paras. (4) to (20)).

[CHAPTER II. PREVENTION]*

Article 11**

Prior authorization

States shall ensure that activities referred to in article 1 are not carried out in their territory or otherwise under their jurisdiction or control without their prior authorization. Such authorization shall also be required in case a major change is planned which may transform an activity into one referred to in article 1.

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* The designation of the Chapter is provisional.

** The present numbering is provisional and follows that proposed by the Special Rapporteur in his reports.

Commentary

(1) This article imposes an obligation on States to ensure that activities having a risk of causing significant transboundary harm are not undertaken in their territory or otherwise under their jurisdiction or control without their prior authorization. The word "authorization" means granting permission by governmental authorities to conduct an activity covered by these articles. States are free to choose the form of such authorization.

(2) It is the view of the Commission that the requirement of authorization obliges a State to ascertain whether activities with a possible risk of significant transboundary harm are taking place in its territory or otherwise under its jurisdiction or control and that the State should take the measures indicated in these articles. This article requires the State to take a responsible and active role in regulating activities taking place in their territory or under their jurisdiction or control with possible significant transboundary harm. The Commission notes, in this respect, that the Trail Smelter Tribunal held that Canada had "the duty ... to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined". 421/ The Tribunal held that in particular, "the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington". 422/ In the view of the Commission, article 11 is compatible with this requirement.

(3) The International Court of Justice in the Corfu Channel case held that a State has an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other States." 423/ In the view of the Commission, the requirement of prior authorization creates the presumption that activities covered by these articles are taking place in the territory or otherwise under the jurisdiction or control of a State with the knowledge of that State.

(4) The words "in their territory or otherwise under their jurisdiction or control", are taken from article 1. The expression "activities referred to in article 1" introduces all the requirements of that article for an activity to fall within the scope of these articles.

421/ Supra note 404, pp. 1965-66.

422/ Ibid, p. 1966.

423/ I.C.J. Reports, 1949, p. 22.

(5) The second sentence of article 11 contemplates situations where a major change is proposed in the conduct of an activity that is otherwise innocuous, where the change would transform that activity into one which involves a risk of causing significant transboundary harm. The implementation of such a change would also require State authorization. It is obvious that prior authorization is also required for a major change planned in an activity already within the scope of article 1, and that change may increase the risk or alter the nature or the scope of the risk.

Article 12

Risk assessment

> Before taking a decision to authorize an activity referred to in article 1, a State shall ensure that an assessment is undertaken of the risk of such activity. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as in the environment of other States.

Commentary

(1) Under article 12, a State, before granting authorization to operators to undertake activities referred to in article 1, should ensure that an assessment is undertaken of the risk of the activity causing significant transboundary harm. This assessment enables the State to determine the extent and the nature of the risk involved in an activity and consequently the type of preventive measures it should take. The Commission feels that as these articles are designed to have global application, they cannot be too detailed. They should contain only what is necessary for clarity.

(2) Although the impact assessment in the Trail Smelter case may not directly relate to liability for risk, it however emphasized the importance of an assessment of the consequences of an activity causing significant risk. The Tribunal in that case indicated that the study undertaken by well-established and known scientists was "probably the most thorough [one] ever made of any area subject to atmospheric pollution by industrial smoke". 424/

(3) The requirement of article 12 is fully consonant with Principle 17 of the Rio Declaration on Environment and Development which provides also for impact assessment of activities that are likely to have a significant adverse impact on the environment:

424/ Supra note 404, pp. 1973-74.

> "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority." 425/

Requirement of assessment of adverse effects of activities have been incorporated in various forms in many international conventions. 426/ The most notable is the Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991 which is devoted entirely to the procedure to conduct and the substance of impact assessment. 427/

(4) The question of who should conduct the assessment is left to States. Such assessment is normally conducted by operators observing certain guidelines set by the States. These matters would have to be resolved by the

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425/ A/CONF.151/Rev.1 (vol.I), p. 3.

426/ See, for example, arts. 205 and 206 of the United Nations Convention on the Law of the Sea, A/CONF.62/122; art. 4 of the Convention on the Regulation of Antarctic Mineral Resources Activities of 2 June 1988, International Legal Materials, vol. 28, p. 868; art. 8 of the Protocol on Environmental Protection to the Antarctic Treaty, of 4 October 1991, ibid., vol. 30, p. 1461; art. 14 (1) (a) and (b) of the Convention on Biological Diversity of 1992, doc. DPI/1307; art. 14 of the ASEAN Agreement on the Conservation of Nature and Natural Resources, of 9 July 1985 in Selected Multilateral Treaties in the Field of Environment, vol. 2, p. 343; Noumea Convention for the Protection of the Natural Resources and Environment of the South-Pacific Region, of 24 November 1986, International Legal Materials, vol. 26, p. 38; art. XI of Kuwait Regional Convention for the Cooperation on the Protection of the Marine Environment from Pollution, of 24 April 1978, ibid., vol. 17, p. 511; and Jeddeh Regional Convention for the Conservation of the Regional Environment of the Red Sea and Gulf of Aden, of 14 February 1982, Selected Multilateral Treaties in the Field of Environment, vol. 2, p. 144. In some treaties, the requirement of impact assessment is implied. For example, the two multilateral treaties regarding communication systems require their signatories to use their communications installations in ways that will not interfere with the facilities of other States parties. Art. 10, para. 2, of the 1927 International Radiotelegraph Convention requires the parties to the Convention to operate stations in such a manner as not to interfere with the radioelectric communications of other contracting States or of persons authorized by those Governments. League of Nations, Treaty Series, vol. LXXXIV, p. 97. Again, the 1936 International Convention concerning the Use of Broadcasting in the Cause of Peace prohibits the broadcasting to another State of material designed to incite the population to act in a manner incompatible with the internal order of security of that State. Ibid., vol. CLXXXVI, p. 301.

427/ For the text of the Convention see, Internationales Umweltrecht - Multilaterale Vertrage, BzUB7/I./92, reprinted in International Legal Materials, vol. 30, p. 800.

States themselves through their domestic laws or applicable international instruments. However, it is presumed that a State will designate an authority, whether or not governmental, to evaluate the assessment on behalf of the Government and will accept responsibility for the conclusions reached by that authority.

(5) The article does not specify what the content of the risk assessment should be. Obviously the assessment of risk of an activity can only be meaningfully prepared if it relates the risk to the possible harm to which the risk could lead. Most existing international conventions and legal instruments do not specify the content of assessment. There are exceptions, such as the Convention on Environmental Impact Assessment in a Transboundary Context, which provides in detail the content of such assessment. 428/

428/ Article 4 of the Convention provides that the environmental impact assessment of a State party should contain, as a minimum, the information described in Appendix II to the Convention. Appendix II lists nine items as follows:

Content of the Environmental Impact Assessment Documentation

Information to be included in the environmental impact assessment documentation shall, as a minimum, contain, in accordance with Article 4:

(a) A description of the proposed activity and its purpose;

(b) A description, where appropriate, of reasonable alternatives (for example, location or technological) to the proposed activity and also the no-action alternative;

(c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;

(d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;

(e) A description of mitigation measures to keep adverse environmental impact to a minimum;

(f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;

(g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;

(h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and

General Assembly resolution 37/217 of 24 March 1983 on International Cooperation in the Field of the Environment also provides, in conclusion No. 8, in detail for the content of assessment for offshore mining and drilling. 429/

(6) The prevailing view in the Commission is to leave the specifics of what ought to be the content of assessment to the domestic laws of the State conducting such assessment. Such an assessment should contain, at least, an evaluation of the possible harmful impact of the activity concerned on persons or property as well as on the environment of other States. This requirement, which is contained in the second sentence of article 12, is intended to clarify further the reference, in the first sentence, to the assessment of "the risk of the activity causing significant transboundary harm". The Commission believes that the additional clarification is necessary for the simple reason that the State of origin will have to transmit the risk assessment to the States which might be suffering harm by that activity. In order for those States to evaluate the risk to which they might be exposed, they need to know what possible harmful effects that activity might have on them as well as the probabilities of the harm occurring.

(7) The assessment shall include the effects of the activity not only on persons and property, but also on the environment of other States. The Commission is convinced of the necessity and the importance of the protection of the environment, independently of any harm to individual human beings or property.

(8) This article does not oblige the States to require risk assessment for any activity being undertaken within their territory or otherwise under their jurisdiction or control. Activities involving a risk of causing significant transboundary harm have some general characteristics which are identifiable and could provide some indication to States as to which activities might fall within the terms of these articles. For example, the type of the source of energy used in manufacturing an activity, the substances manipulated in production, the location of the activity and its proximity to the border

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(i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.).

For the Convention, see International Legal Materials, vol. 30, p. 800, 1991.

429/ General Assembly Official Records: Thirty-seventh Session, Supp. No. 51 (A/37/51).

area, etc. could all give an indication of whether the activity might fall within the scope of these articles. There are certain substances that are listed in some conventions as dangerous or hazardous and their use in any activity in itself may be an indication that those activities might have significant transboundary harm. 430/ There are also certain conventions that list the activities that are presumed to be harmful and that might signal that those activities might fall within the scope of these articles. 431/

Article 13

Pre-existing activities

> If a State, having assumed the obligations contained in these articles, ascertains that an activity involving a risk of causing significant transboundary harm is already being carried out in its territory or otherwise under its jurisdiction or control without the authorization as required by article 11, it shall direct those responsible for carrying out the activity that they must obtain the necessary authorization. Pending authorization, the State may permit the continuation of the activity in question at its own risk.

430/ For example, the 1974 Convention for the Prevention of Marine Pollution from Land-based Sources provides in art. 4 an obligation for parties to eliminate or restrict the pollution of the environment by certain substances and the list of those substances are annexed to the Convention, UNEP, Selected Multilateral Treaties in the Field of the Environment, Ref. Series 3, 1983, p. 430. Similarly, the 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area provides a list of hazardous substances in annex I and of noxious substances and materials in annex II, deposits of which are either prohibited or strictly limited, in ibid, p. 405. See also the Protocol to the 1976 Convention for the Protection of the Mediterranean Sea against Pollution, in ibid., p. 448; and the 1976 Convention for the Protection of the Rhine against Chemical Pollution, in United Nations, Treaty Series, vol. 1124, p. 375.

431/ See for example annex I to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context, where a number of activities such as the crude oil refineries, thermal power stations, installations to produce enriched nuclear fuels, etc. are identified as possibly dangerous to the environment and requiring environmental impact assessment under the Convention, International Legal Materials, vol. 30, p. 800; and annex II of the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, where activities such as the installations of sites for the partial or complete disposal of solid, liquid wastes by incineration on land or at sea, installations or sites for thermal degradation of solid, gaseous or liquid wastes under reduced oxygen supply, etc. have been identified as dangerous activities. This Convention also has a list of dangerous substances in annex I. The Convention E.T.S. 150.

Commentary

(1) Article 13 is intended to apply in respect of activities within the scope of article 1, which were being conducted in a State before that State assumed the obligations contained in these articles. The words "having assumed the obligations contained in these articles" are without prejudice to the final form of these articles.

(2) In accordance with this article, when the State "ascertains" that such an activity is being conducted in its territory or otherwise under its jurisdiction or control, when it assumes the obligations under these articles, it should "direct" those responsible for carrying out the activity to obtain the necessary authorization. The expression "necessary authorization" here means permits required under the domestic law of the State, in order to implement its obligations under these articles.

(3) The Commission is aware that it might be unreasonable to require States when they assume the obligations under these articles to apply them immediately in respect of existing activities. An immediate requirement of compliance could put a State in breach of the article, the moment it assumes the obligations under these articles. In addition, a State, at the moment it assumes the obligations under these articles, might not know of the existence of all such activities within its territory or under its jurisdiction or control. For that reason, the article provides that when a State "ascertains" the existence of such an activity, it should comply with the obligations. The word "ascertain" in this article should not, however, be interpreted so as to justify States merely to wait until such information is brought to their knowledge by other States or private entities. The word "ascertain" should be understood in the context of the obligation of due diligence, requiring reasonable and good faith efforts by the States to identify such activities.

(4) A certain period of time might be needed for the operator of the activity to comply with the authorization requirements. The Commission is of the view that the choice between whether the activity should be stopped pending authorization or should continue while the operator goes through the process of obtaining authorization should be left to the State of origin. If the State chooses to allow the activity to continue, it does so at its own risk. It is the view of the Commission that absent any language in the article indicating possible repercussions, the State of origin will have no incentive to comply and to do so expeditiously with the requirements of these articles. At the same time, in view of the fact that the Commission has not yet decided

on the form and the substance of a liability regime for this topic, the issue cannot be prejudged at this time. Therefore, the expression "at its own risk" is intended: (a) to leave the possibility open for any consequences as the future draft articles on this topic might impose on the State of origin in such circumstances; and (b) to leave the possibility open for the application of any rule of international law on responsibility in such circumstances.

(5) Some members of the Commission favoured the deletion of the words "at its own risk". In their view, those words implied that the State of origin may be liable for any damage caused by such activities before authorization was granted. That implication, they believed, prejudged the issue of liability which the Commission had not even discussed. The reservation of these members extended also to the use of these words in article 18, paragraph 3. Other members of the Commission, however, favoured the retention of those words. In their view, those words did not imply that the State of origin was liable for any harm caused; it only kept the option of such a possible liability open. They also felt that the deletion of those words would change the fair balance the article maintains between the interests of the State of origin and the States likely to be affected.

(6) The view was expressed by one member of the Commission that the last sentence of article 13 [reading "Pending authorization, the State may permit the continuation of the activity in question at its own risk."] should be deleted; and if this were done, the words ", having assumed the obligations contained in these articles" in the first line of article 13 would not be necessary. The words in question touched on the difficult question of liability which had still to be considered by the Commission; and moreover seemed to predetermine whether the Principles being formulated ought or ought not to be in treaty form. It had already been agreed by the Commission that the treaty or other form to be given to the Principles should be considered at a later date.

(7) In case the authorization is denied by the State of origin, it is assumed that the State of origin will stop the activity. If the State of origin fails to do so, it will be assumed that the activity is being conducted with the knowledge and the consent of the State of origin and the consequences of this situation remain to be dealt with by the Commission (see para. 4 above).

Article 14*

Measures to prevent or minimize the risk

> States shall take legislative, administrative or other actions to ensure that all appropriate measures are adopted to prevent or minimize the risk of transboundary harm of activities referred to in article 1.

Commentary

(1) The standard of the obligation of States to take preventive measures is due diligence. Article 14 is the core of the due diligence obligation requiring States to take certain unilateral measures to prevent or minimize a risk of significant transboundary harm. The obligation imposed by this article is not an obligation of result. It is the conduct of a State that will determine whether the State has complied with its obligation under this article.

(2) An obligation of due diligence can also be deduced from a number of international conventions 432/ as well as from the resolutions and reports of international conferences and organizations as the standard basis for the protection of the environment from harm. 433/ The obligation of due diligence was recently discussed in a dispute between Germany and Switzerland relating to the pollution of the Rhine by Sandoz; the Swiss Government

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* The expression "prevent or minimize the risk" of transboundary harm in this and other articles will be reconsidered in the light of the decision by the Commission as to whether the concept of prevention includes, in addition to measures aimed at preventing or minimizing the risk of occurrence of an accident, measures taken after the occurrence of an accident to prevent or minimize the harm caused.

432/ See for example, art. 194, para. 1, of the United Nations Convention on the Law of the Sea, A/CONF.62/122; arts. I, II and VII (2) of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter in International Legal Materials, vol. 11, p. 1294; art. 2 of the Vienna Convention for the Protection of the Ozone Layer; ibid; vol. 26, p. 1529. art. 7, para. 5, of the Convention on the Regulation of Antarctic Mineral Resources Activities, International Legal Materials, vol. 28, p. 868; art. 2, para. 1, of the Convention on Environmental Impact Assessment in a Transboundary Context, doc. E/ECE/1250; and art. 2, para. 1, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes International Legal Materials, vol. 31, p. 1313.

433/ See Principle 21 of the World Charter for Nature, General Assembly resolution 37/7 adopted on 28 October 1982; Principle VI of Draft Principles relating to weather modification prepared by the WHO and by UNEP, in Digest of United States Practice in International Law, 1978, p. 1205.

acknowledged responsibility for lack of due diligence in preventing the accident through adequate regulation of its pharmaceutical industries. 434/

(3) In the Alabama case, the Tribunal examined two different definitions submitted by the parties, the United States and the United Kingdom, of due diligence. The United States defined due diligence as:

> "[A] diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it; a diligence which shall, by the use of active vigilance, and of all the other means in the power of the neutral, through all stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will, ..." 435/

The United Kingdom defined due diligence as "such care as governments ordinarily employ in their domestic concerns." 436/ The Tribunal seemed to have been persuaded by the broader definition of the standard of due diligence presented by the United States and expressed concern about the "national standard" of due diligence presented by the United Kingdom. The Tribunal stated that "The British Case seemed also to narrow the international duties of a government to the exercise of the restraining powers conferred upon it by municipal law, and to overlook the obligation of the neutral to amend its laws when they were insufficient". 437/

(4) The extent and the standard of the obligation of due diligence was also elaborated on by Lord Atkin in the case of Donoghue v. Stevenson as follows:

> "The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, "who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour?

434/ See New York Times, 11 November 1986, p. A 1; 12 November 1986, p. A 8; 13 November 1986, p. A 3. See also Alexander Kiss, "Tchernobale" ou la pollution accidentelle due Rhin par les produits chimiques, in Annuaire Français de Droit International, vol. 33, 1987, pp. 719-727.

435/ The Geneva Arbitration (The Alabama case) in J. B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party, vol. I, 1898, pp. 572-73.

436/ Ibid., p. 612.

437/ Ibid.

> The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called into question." 438/

(5) In the context of article 14, due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them. Thus, in accordance with article 14, States are under an obligation to take unilateral measures to prevent or minimize the risk of transboundary harm of the activities within the scope of article 1. Such measures include, first, formulating policies designed to prevent or minimize transboundary harm and, second, implementing those policies. Such policies are expressed in legislation and administrative instructions and implemented through various enforcement mechanisms. The word "ensure" in the phrase "to ensure that all necessary measures are adopted" is intended to require a particularly high standard in State behaviour viz., to be rigorous in designing and implementing policies directed at minimizing transboundary harm.

(6) The Commission believes that the standard of due diligence against which the conduct of a State should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. For example, activities which may be considered ultra-hazardous require a much higher standard of care in designing policies and a much higher degree of vigour on the part of the State to enforce them. Issues such as the size of the operation; its location; special climate conditions; materials used in the activity; and whether the conclusions drawn from the application of these factors in a specific case are reasonable are among the factors to be considered in determining the due diligence requirement in each instance. The Commission also believes that what would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time might not be considered as such at some point in the future. Therefore, due diligence requires a State to keep abreast of technological changes and scientific developments and to

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438/ [1932] A.C., p. 580 (H.L.(Sc)).

determine not only that equipment for a particular activity is working properly, but also that it meets the most current specifications and standards.

(7) The Commission takes note of Principle 11 of the Rio Declaration on Environment and Development which states:

> "States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries." 439/

Similar language is found in Principle 23 of the Stockholm Declaration. That Principle, however, specifies that such domestic standards are "[w]ithout prejudice to such criteria as may be agreed upon by the international community". 440/ It is the view of the Commission that the economic level of States is one of the factors which is taken into account in determining whether an appropriate standard of due diligence has been exercised by a State. But a State's economic level cannot be used to discharge a State from its obligation under this article.

(8) The words "administrative and other actions" cover various forms of enforcement actions. Such actions may be taken by regulatory agencies monitoring the activities and courts and by administrative tribunals imposing sanctions on operators not complying with the rules and the standards or any other pertinent enforcement procedure a State has established.

(9) The obligation of the State is first to attempt to design policies and to take legislative or other actions with the aim of preventing significant transboundary harm. If that is not possible, then the obligation is to attempt to minimize such harm. In the view of the Commission, the word "minimize" should be understood in this context to mean reducing the possibility of harm to the lowest point.

(10) The expression "prevention" in this article, pending a further decision by the Commission, is intended to cover only those measures taken before the occurrence of an accident in order to prevent or minimize the risk of the occurrence of the accident.

439/ Doc. A/CONF.151/26/Rev.1 (vol. I), p. 3.

440/ Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, Doc. A/CONF.48/Rev.1.

(11) The references made to the "due diligence" criterion in the preceding paragraphs of the commentary on article 14 gave rise to concern on the part of one member of the Commission. It was, in his view, a difficult criterion to apply, particularly when facts were complex; and could lead to the unfortunate result that certain risks of transboundary harm, which would be included if the "all appropriate measures" standard provided for in the text of article 14 was applied, may be excluded under the "due diligence" criterion. The question of the appropriateness of the "due diligence" criterion would need to be further examined in the course of the second reading of the articles by the Commission.

Article 14 bis [20 bis]

Non-transference of risk

> In taking measures to prevent or minimize a risk of causing significant transboundary harm, States shall ensure that the risk is not simply transferred, directly or indirectly, from one area to another or transformed from one type of risk into another.

Commentary

(1) This article states a general principle of non-transference of risk. It calls on States when taking measures to prevent or minimize a risk of causing significant transboundary harm to ensure that the risk is not "simply" transferred, directly or indirectly, from one area to another or transformed from one type of risk to another. This article is inspired by the new trend in environmental law, beginning with its endorsement by the Stockholm Conference on the Human Environment, to design comprehensive policy for protecting the environment. Principle 13 of the General Principles for Assessment and Control of Marine Pollution suggested by the Intergovernmental Working Group on Marine Pollution and endorsed by the United Nations Conference on the Human Environment provides:

> "Action to prevent and control marine pollution (particularly direct prohibitions and specific release limits) must guard against the effect of simply transferring damage or hazard from one part of the environment to another." 441/

(2) This Principle was incorporated in article 195 of the United Nations Convention on the Law of the Sea which states:

441/ Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, Annex III, doc. A/CONF.48/Rev.1, p. 73.

> "In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another." 442/

Article II, paragraph 2, of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters also provides for a similar principle:

> "In taking measures to control and regulate hazardous activities and substances, to prevent and control accidental pollution, to mitigate damage arising from accidental pollution, countries should do everything so as not to transfer, directly or indirectly, damage or risks between different environmental media or transform one type of pollution into another." 443/

(3) The Rio Declaration on Environment and Development discourages States, in Principle 14, from relocating and transferring to other States activities and substances harmful to the environment and human health. This Principle even though primarily aimed at a different problem, is rather more limited than Principle 13 of the Principles for Assessment and Control of Marine Pollution, the Law of the Sea and the Code of Conduct mentioned earlier. Principle 14 reads:

> "States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health." 444/

(4) The expression "simply transferred ... or transformed" is concerned with precluding actions that purport to prevent or minimize but, in fact, merely externalize the risk by shifting it to a different sequence or activity without any meaningful reduction of said risk (see Principle 13 of the Principles for Assessment and Control of Marine Pollution endorsed by the Stockholm Conference in 1972). The Commission is aware that, in the context of this topic, the choice of an activity, the place in which it should be conducted and the use of measures to prevent or reduce risk of its transboundary harm are, in general, matters that have to be determined through the process of finding an equitable balance of interests of the parties concerned; obviously the requirement of this article should be understood in

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442/ A/Doc.A/CONF.62/122.

443/ E/ECE/1225; ECE/ENVWA/16.

444/ Doc. A/CONF.151/26/Rev.1 (vol. I), p. 3.

that context. It is, however, the view of the Commission that in the process of finding an equitable balance of interests, the parties should take into account the general principle provided for in the article.

(5) The word "transfer" means physical movement from one place to another. The word "transformed" is used in article 195 of the Law of Sea Convention and refers to the quality or the nature of risk. The words "directly or indirectly" are used in article 195 of the Law of the Sea Convention and are intended to set a much higher degree of care for the States in complying with their obligations under this article.

Article 15

Notification and information

> 1. If the assessment referred to in article 12 indicates a risk of causing significant transboundary harm, the State of origin shall notify without delay the States likely to be affected and shall transmit to them the available technical and other relevant information on which the assessment is based and an indication of a reasonable time within a response is required.
>
> 2. Where it subsequently comes to the knowledge of the State of origin that there are other States likely to be affected, it shall notify them without delay.

Commentary

(1) Article 15 deals with a situation in which the assessment undertaken by a State, in accordance with article 12, indicates that the activity planned does indeed pose a risk of causing significant transboundary harm. This article, together with articles 16, 16 bis, 18 and 19 provides for a set of procedures essential to balancing the interests of all the States concerned by giving them a reasonable opportunity to find a way to undertake the activity with satisfactory and reasonable measures designed to prevent or minimize transboundary harm.

(2) Article 15 calls on a State to notify other States that are likely to be affected by the activity that is planned. The activities here include both those that are planned by the State itself and by private entities. The requirement of notification is an indispensable part of any system designed to prevent or minimize transboundary harm.

(3) The obligation to notify other States of the risk of significant harm to which they are exposed is reflected in the Corfu Channel case, where the International Court of Justice characterized the duty to warn as based on

"elementary considerations of humanity". 445/ This principle is recognized in the context of the use of international watercourses and in that context is embodied in a number of international agreements, decisions of international courts and tribunals, declarations and resolutions adopted by intergovernmental organizations, conferences and meetings, and studies by intergovernmental and international non-governmental organizations. 446/

(4) In addition to the utilization of international watercourses, the principle of notification has also been recognized in respect of other activities with transboundary effects. For example, article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context 447/ and articles 3 and 10 of the Convention on the Transboundary Effects of Industrial Accidents. 448/ Principle 19 of the Rio Declaration on Environment and Development speaks of timely notification:

> "States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith." 449/

(5) The procedure for notification has been established by a number of OECD resolutions. For example, in respect of certain chemical substances, OECD resolution C(71)73 of 18 May 1971 stipulates that each member State is to receive notification prior to the proposed measures in each other member State regarding substances which have adverse impact on man or the environment where such measures could have significant effects on the economics and trade of the

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445/ *Supra* note 402, p. 22.

446/ For treaties dealing with prior notification and exchange of information in respect of watercourses, see commentary to article 12 "Notification concerning planned measures with possible adverse effects" of the draft articles on The Law of the Non-Navigational Uses of International Watercourses, Chapter III, section D, above.

447/ Article 3 of the Convention provides for an elaborate system of notification. For the Convention see E/ECE/1250, reproduction *International Legal Materials*, vol. 30, p. 800. ...

448/ Ibid., vol. 31, p. 1333.

449/ Doc. A/CONF.151/26/Rev.1 (vol. I), p. 3.

other States.[450] OECD resolution C(74)224 on 14 November 1974 on the "Principles concerning transfrontier pollution" in its "Principle of information and consultation" requires notification and consultation prior to undertaking an activity which may create a risk of significant transboundary pollution.[451]

(6) The principle of notification is well established in the case of environmental emergencies. Principle 18 of the Rio Declaration on Environment and Development,[452] article 198 of the United Nations Convention on the Law of Sea;[453] article .. of the Convention on Early Notification of a Nuclear Accident;[454] article 14 (1) (d) and (3) of the Convention on Biological Diversity;[455] and article 5 (1) (c) of the International Convention on Oil Pollution Preparedness, Response and Cooperation[456] all require notification.

(7) Where assessment reveals the risk of causing significant transboundary harm, in accordance with paragraph 1, the State which plans to undertake such activity has the obligation to notify the States which may be affected. The notification shall be accompanied by available technical information on which the assessment is based. The reference to "available" technical and other relevant information is intended to indicate that the obligation of the State of origin is limited to transmitting the technical and other information which was developed in relation to the activity. This information is generally revealed during the assessment of the activity in accordance with article 12. Paragraph 1 assumes that technical information resulting from the assessment includes not only what might be called raw data, namely fact sheets,

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[450] OECD, OECD and the Environment, 1986, p. 89, para. 4, of the Annex.

[451] Ibid., p. 142.

[452] Ibid.

[453] Doc. A/CONF.62/122.

[454] International Legal Materials, vol. 25, p. 1369.

[455] Doc. DPI/1307.

[456] International Legal Materials, vol. 30, p. 735.

statistics, etc., but also the analysis of the information which was used by the State of origin itself to make the determination regarding the risk of transboundary harm.

(8) States are free to decide how they wish to inform the States that are likely to be affected. As a general rule, it is assumed that States will directly contact the other States through diplomatic channels. In the absence of diplomatic relations, States may give notification to the other States through a third State.

(9) Paragraph 2 addresses the situation where the State of origin, despite all its efforts and diligence, is unable to identify all the States that may be affected prior to authorizing the activity, but only after the activity is undertaken gains that knowledge. In accordance with this paragraph, the State of origin, in such cases, is under the obligation to make such notification without delay. The reference without delay is intended to require that the State of origin should make notification as soon as the information comes to its knowledge and it has had an opportunity, within a reasonable time, to determine that certain other States are likely to be affected by the activity.

Article 16

Exchange of information

> While the activity is being carried out, the States concerned shall exchange in a timely manner all information relevant to preventing or minimizing the risk of causing significant transboundary harm.

Commentary

(1) Article 16 deals with steps to be taken after an activity has been undertaken. The purpose of all these steps is the same as previous articles viz., to prevent or minimize the risk of causing significant transboundary harm.

(2) Article 16 requires the State of origin and the likely affected States to exchange information regarding the activity, after it has been undertaken. In the view of the Commission, preventing and minimizing the risk of transboundary harm based on the concept of due diligence are not a once-and-for-all effort; they require continuing efforts. This means that due diligence is not terminated after granting authorization for the activity and undertaking the activity; it continues in respect of monitoring the implementation of the activity as long as the activity continues.

(3) The information that is required to be exchanged, under article 16, is whatever would be useful, in the particular instance, for the purpose of prevention of risk of significant harm. Normally such information comes to the knowledge of the State of origin. However, when the State that is likely to be affected has any information which might be useful for prevention purposes, it should make it available to the State of origin.

(4) The requirement of exchange of information is fairly common in conventions designed to prevent or reduce environmental and transboundary harm. These conventions provide for various ways of gathering and exchanging information, either between the parties or through providing the information to an international organization which makes it available to other States. 457/ In the context of these articles, where the activities are most likely to involve a few States, the exchange of information is effected between the States directly concerned. Where the information might affect a large number of States, relevant information may be exchanged through other avenues, such as for example, competent international organizations.

(5) Article 16 requires that such information should be exchanged in a timely manner. This means that when the State becomes aware of such information, it should inform the other States quickly so that there will be enough time for the States concerned to consult on appropriate preventive measures or the States likely to be affected will have sufficient time to take proper actions.

457/ For example, article 10 of the Convention on the Protection of Marine Pollution from Land-based Sources; International Legal Materials, vol. 13, p. 352; article 4 of the Vienna Convention for the Protection of the Ozone Layer, ibid., vol. 26, p. 1529 and article 200 of the United Nations Convention on the Law of Sea, A/CONF.62/122 speak of individual or joint research by the States parties on prevention or reduction of pollution and of transmitting to each other directly or through a competent international organization the information so obtained. The Convention on Long-range Transboundary Air Pollution provides for research and exchange of information regarding the impact of activities undertaken by the State parties to the Convention, in International Legal Materials, vol. 18, p. 1442. Examples are found in other conventions such as article VI, para. 1 (iii) of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters, Doc. E/ECE/1225-ECE/ENVWA/16; article 17 of the Convention on Biological Diversity, Doc. DPI/1307; and article 13 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, International Legal Materials, vol. 31, p. 1313.

(6) There is no requirement in the article as to the frequency of exchange of information. The requirement of article 16 comes into operation only when States have any information which is relevant to preventing or minimizing transboundary harm.

Article 16 bis

Information to the public

> States shall, whenever possible and by such means as are appropriate, provide their own public likely to be affected by an activity referred to in article 1 with information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Commentary

(1) Article 16 bis requires States, whenever possible and by such means as are appropriate, to provide their own public with information relating to the risk and harm that might result from an activity subject to authorization and to ascertain their views thereon. The article therefore requires States (a) to provide information to their public regarding the activity and the risk and the harm it involves, and (b) to ascertain the views of the public. It is, of course, clear that the purpose of providing information to the public is in order to allow its members to inform themselves and then to ascertain their views. Without that second step, the purpose of the article would be defeated.

(2) The content of the information to be provided to the public includes information about the activity itself as well as the nature and the scope of risk and harm that it entails. Such information is contained in the documents accompanying the notification which is effected in accordance with article 15 or in the assessment which may be carried out by the State likely to be affected under article 19.

(3) This article is inspired by new trends in international law, in general, and environmental law, in particular of seeking to involve in the decision-making processes, individuals whose lives, health, property and environment might be affected by providing them with a chance to present their views and be heard by those responsible for making the ultimate decisions.

(4) Principle 10 of the Rio Declaration on Environment and Development provides for public involvement in decision-making processes as follows:

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each

> individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." 458/

(5) A number of other recent international legal agreements dealing with environmental issues have required States to provide the public with information and to give it an opportunity to participate in decision-making processes. Article VII, paragraphs 1 and 2, of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters is relevant in that context:

> "1. In order to promote informed decision-making by central, regional or local authorities in proceedings concerning accidental pollution of transboundary inland waters, countries should facilitate participation of the public likely to be affected in hearings and preliminary inquiries and the making of objections in respect of proposed decisions, as well as recourse to and standing in administrative and judicial proceedings.
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> 2. Countries of incident should take all appropriate measures to provide physical and legal persons exposed to a significant risk of accidental pollution of transboundary inland waters with sufficient information to enable them to exercise the rights accorded to them by national law in accordance with the objectives of this Code." 459/

Article 16 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes; 460/ Article 3, paragraph 8 of the Convention on Environmental Impact Assessment in a Transboundary Context; 461/ Article 17 of the Convention on the Protection of the

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458/ Doc. A/CONF.155/26/Rev.1 (vol. I), p. 3.

459/ Economic Commission for Europe, Code of Conduct on Accidental Pollution of Transboundary Inland Waters, Doc. E/ECE/1225 - ECE/ENVWA/16.

460/ International Legal Materials, vol. 31, p. 1313.

461/ E/ECE/1250, reproduced in International Legal Materials, vol. 30, p. 800.

Marine Environment of the Baltic Sea Area 462/ and Article 6 of the United Nations Framework Convention on Climate Change 463/ all provide for information to the public.

(6) There are many modalities for participation in decision-making processes. Reviewing data and information on the basis of which decisions will be based and having an opportunity to confirm or challenge the accuracy of the facts, the analysis and the policy considerations either through administrative tribunals, courts, or groups of concerned citizens is one way of participation in decision-making. In the view of the Commission, this form of public involvement enhances the efforts to prevent transboundary and environmental harm.

(7) The obligation contained in article 16 bis is circumscribed by the phrase "whenever possible and by such means as are appropriate". The words "whenever possible" are assigned here a normative rather than factual reference are intended to take into account possible constitutional and other domestic limitations where such right to hearings, may not exist. The words "by such means as are appropriate" is intended to leave the ways which such information could be provided to the States, their domestic law requirements and the State policy as to, for example, whether such information should be provided through media, non-governmental organizations, public agencies, local authorities, etc.

(8) Article 16 bis limits the obligation of each State to providing such information to its own public. The words "States shall, ..., give to their own public" does not obligate a State to provide information to the public of another State. For example, the State that might be affected, after receiving notification and information from the State of origin, shall, when possible and by such means as are appropriate, inform those parts of its own public likely to be affected before responding to the notification.

Article 17

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but

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462/ UNCLOS (05)/B8, No. 22, pp. 54-87.

463/ International Legal Materials, vol. 31, p. 851.

the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Commentary

(1) Article 17 is intended to create a narrow exception to the obligation of States to provide information in accordance with articles 15, 16 and 16 bis. In the view of the Commission, States should not be obligated to disclose information that is vital to their national security or is considered an industrial secret. This type of clause is not unusual in treaties which require exchange of information. Article 31 of the draft articles on the law of the Non-Navigational Uses of International Watercourses 464/ also provides for a similar exception to the requirement of disclosure of information.

(2) Article 17 includes industrial secrets in addition to national security. In the context of these articles, it is highly probable that some of the activities which come within the scope of article 1 might involve the use of sophisticated technology involving certain types of information which are protected even under the domestic law. Normally, domestic laws of States determine the information that is considered an industrial secret and provide protection for them. This type of safeguard clause is not unusual in legal instruments dealing with exchange of information relating to industrial activities. For example, Article 8 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes 465/ and Article 2, paragraph 8 of the Convention on Environmental Impact Assessment in a Transboundary Context 466/ provide for similar protection of industrial and commercial secrecy.

(3) Article 17 recognizes the need for balance between the legitimate interests of the State of origin and the States that are likely to be affected. It, therefore, requires the State of origin that is withholding information on the grounds of security or industrial secrecy, to cooperate in good faith with the other States in providing as much information as can be provided under the circumstances. The words "as much information as can be

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464/ See Chapter III, section D above.

465/ International Legal Materials, vol. 31, p. 1313

466/ Ibid, vol. 30, p. 800.

provided" include for example, the general description of the risk and the type and the extent of harm to which a State may be exposed. The words "under the circumstances" refer to the conditions invoked for withholding the information. Article 17 relies on the good faith cooperation of the parties.

Article 18

Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them and without delay, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of causing significant transboundary harm, and cooperate in the implementation of these measures.

2. States shall seek solutions based on an equitable balance of interests in the light of article 20.

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution the State of origin shall nevertheless take into account the interests of States likely to be affected and may proceed with the activity at its own risk, without prejudice to the right of any State withholding its agreement to pursue such rights as it may have under these articles or otherwise.

Commentary

(1) Article 18 requires the States concerned, that is the State of origin and the States that are likely to be affected, to enter into consultations in order to agree on the measures to prevent or minimize the risk of causing significant transboundary harm. Depending upon the time at which article 18 is invoked, consultations may be prior to authorization and commencement of an activity or during its performance.

(2) The Commission has attempted to maintain a balance between two equally important considerations in this article. First, the article deals with activities that are not prohibited by international law and that, normally, are important to the economic development of the State of origin. But second, it would be unfair to other States to allow those activities to be conducted without consulting them and taking appropriate preventive measures. Therefore, the article provides neither a mere formality which the State of origin has to go through with no real intention of reaching a solution acceptable to the other States, nor does it provide a right of veto for the States that are likely to be affected. To maintain a balance, the article relies on the manner in which, and purpose for which, the parties enter into consultations. The parties must enter into consultations in good faith and must take into

account each other's legitimate interests. The parties consult each other with a view to arriving at an acceptable solution regarding the measures to be adopted to prevent or minimize the risk of significant transboundary harm.

(3) It is the view of the Commission that the principle of good faith is an integral part of any requirement of consultations and negotiations. The obligation to consult and negotiate genuinely and in good faith was recognized in the Lake Lanoux award where the Tribunal stated that:

> "Consultations and negotiations between the two States must be genuine, must comply with the rules of good faith and must not be mere formalities. The rules of reason and good faith are applicable to procedural rights and duties relative to the sharing of the use of international rivers." 467/

(4) With regard to this particular point about good faith, the Commission also relies on the judgement of the International Court of Justice in the Fisheries Jurisdiction (United Kingdom v. Iceland) case. There the Court stated that: "[t]he task [of the parties] will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other". 468/ The Commission also finds the decision of the Court in the North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. Netherlands) 469/ on the manner in which negotiations should be conducted relevant to this article. In those cases the Court ruled as follows:

> "(a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it." 470/

467/ International Law Reports, 1957 (London, 1961), vol. 24, p. 119.

468/ Fisheries Jurisdiction (United Kingdom v. Iceland) case, Merits, Judgment of 25 July 1974, I.C.J. Reports 1974, para. 78.

469/ North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark, and Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969, I.C.J. Reports 1969, especially p. 47, paras. 85 and 87.

470/ Ibid., para. 85.

Even though the Court in this judgement speaks of "negotiations", the Commission believes that the good faith requirement in the conduct of the parties during the course of consultation or negotiations are the same.

(5) Under paragraph 1, the States concerned shall enter to consultations at the request of any of them. That is either the State of origin or any of the States likely to be affected. The parties shall enter into consultations without delay. The expression without delay is intended to avoid those situations where a State, upon being requested to enter into consultations, would make unreasonable excuses to delay consultations.

(6) The purpose of consultations is for the parties: (a) to find acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of significant transboundary harm; and (b) to cooperate in the implementation of those measures. The words "acceptable solutions", regarding the adoption of preventive measures, refers to those measures that are accepted by the parties within the guidelines specified in paragraph 2. Generally, the consent of the parties on measures of prevention will be expressed by means of some form of an agreement.

(7) The parties should obviously aim, first, at selecting those measures which may avoid any risk of causing significant transboundary harm or, if that is not possible, which minimize the risk of such harm. Once those measures are selected, the parties are required, under the last clause of paragraph 1, to cooperate in their implementation. This requirement, again, stems from the view of the Commission that the obligation of due diligence, the core base of the provisions intended to prevent or minimize significant transboundary harm, is of a continuous nature affecting every stage related to the conduct of the activity.

(8) Article 18 may be invoked whenever there is a question about the need to take preventive measures. Such questions obviously may arise as a result of article 15, because a notification to other States has been made by the State of origin that an activity it intends to undertake may pose a risk of causing significant transboundary harm; or in the course of the exchange of information under article 16 or in the context of article 19 on the rights of the State likely to be affected.

(9) Article 18 has a broad scope of application. It is to apply to all issues related to preventive measures. For example, when parties notify under

article 15 or exchange information under article 16 and there are ambiguities in those communications, a request for consultations may be made simply in order to clarify those ambiguities.

(10) Paragraph 2 provides guidance for States when consulting each other on preventive measures. The parties shall seek solutions based on an equitable balance of interests in light of article 20 (Factors involved in a balance of interests). Neither paragraph 2 of this article nor article 20 precludes the parties from taking account of other factors which they perceive as relevant in achieving an equitable balance of interests.

(11) Paragraph 3 deals with the possibility that, despite all efforts by the parties, they cannot reach an agreement on acceptable preventive measures. As explained in paragraph (3) above, the article maintains a balance between the two considerations, one of which is to deny the States likely to be affected a right of veto. In this context, the Commission recalls the Lake Lanoux award where the Tribunal noted that in certain situations, the party that was likely to be affected, might, in violation of good faith, paralyse genuine negotiation efforts. 471/ To take account of this possibility, the article provides that the State of origin is permitted to go ahead with the activity, for the absence of such an alternative would, in effect, create a right of veto for the States likely to be affected. The State of origin, while permitted to go ahead with the activity, is still obligated to take into account the interests of the States likely to be affected. As a result of consultations, the State of origin is aware of the concerns of the States likely to be affected and is in even a better position to seriously take them into account in carrying out the activity. In addition, the State of origin conducts the activity "at its own risk". This expression is also used in article 13 on "Pre-existing activities". The explanations given in paragraph (4) of the commentary of article 13 on this expression also apply here.

(12) The last part of paragraph 3 also protects the interests of States likely to be affected, by allowing them to pursue any rights that they might have under these articles or otherwise. The word "otherwise" is intended to have a

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471/ See supra note 467, p. 128.

broad scope so as to include such rights as the States likely to be affected have under any rule of international law, general principles of law, domestic law, etc.

Article 19

Rights of the State likely to be affected

> 1. When no notification has been given of an activity conducted in the territory or otherwise under the jurisdiction or control of a State, any other State which has serious reason to believe that the activity has created a risk of causing it significant harm may require consultations under article 18.
>
> 2. The State requiring consultations shall provide technical assessment setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1, the State requiring consultations may claim an equitable share of the cost of the assessment from the State of origin.

Commentary

(1) This article addresses the situation in which a State, although it has received no notification about an activity in accordance with article 15, becomes aware that an activity is being carried out in another State, either by the State itself or by a private entity and believes that the activity carries a risk of causing it significant harm.

(2) This article is intended to protect the rights and the legitimate interests of States that have reason to believe that they are likely to be adversely affected by an activity. Article 19 enables them to request consultations and imposes a coordinate obligation on the State of origin to accede to the request. In the absence of article 19, the States likely to be affected cannot compel the State of origin to enter into consultations. Similar provisions have been provided for in other legal instruments. Article 18 of the draft articles on the Law of the Non-Navigational Uses of International Watercourses, 472/ and article 3, paragraph 7, of the Convention on Environmental Impact Assessment in a Transboundary Context 473/ also contemplate a procedure by which a State likely to be affected by an activity can initiate consultations with the State of origin.

472/ See Chapter III, section D. above.

473/ International Legal Materials, vol. 30, p. 800.

(3) Paragraph 1 allows a State which has serious reason to believe that the activity being conducted in the territory, or otherwise under the jurisdiction or control of another State, has created a risk of causing it significant harm to require consultations under article 18. The words serious reason in the third line of paragraph 1 are intended to preclude other States from creating unnecessary difficulties for the State of origin by requesting consultations on mere suspicion or conjecture. Of course, the State claiming that it has been exposed to a significant risk of transboundary harm will have a far stronger case when it can show that it has already suffered injury as the result of the activity.

(4) Once consultations have begun, the States concerned will either agree that the activity is one of those covered by article 1, and the State of origin should therefore take preventive measures; or the parties will not agree and the State of origin will continue to believe that the activity is not within the scope of article 1. In the former case, the parties must conduct their consultations in accordance with article 18 and find acceptable solutions based on an equitable balance of interests. In the latter case, namely where the parties disagree on the very nature of the activity, no further step is anticipated in the paragraph. The Commission will revert to this issue once it has discussed the question of ways and means of settlement of disputes.

(5) This paragraph does not apply to situations in which the State of origin is still at the planning stage of the activity, for it is assumed that the State of origin may still notify the States likely to be affected. However, if such notification is not effected, the States likely to be affected may require consultations as soon as the activity begins. Consultation may also be requested at the very early stages of the activity such as, for example, the stage of construction.

(6) Paragraph 2, in its first sentence, attempts to strike a fair balance between the interests of the State of origin that has been required to enter into consultations and the interests of the State which believes it has been affected or that it is likely to be affected by requiring the latter State to provide justification for such a belief and support it with documents containing its own technical assessment of the alleged risk. The State requesting consultations must, as mentioned above, have a "serious reason" for believing that there is a risk and it is likely to suffer harm from it. Taking into account that that State has not received any information from the

State of origin regarding the activity and therefore may not have access to all the relevant technical data, the supporting documents and the assessment required of it need not be complete, but should be sufficient to provide a reasonable ground for its assertions. The expression "serious reason" should be interpreted in that context.

(7) The second sentence of paragraph 2 deals with financial consequences, if it is proved that the activity in question is within the scope of article 1. In such cases, the State of origin may be requested to pay an equitable share of the cost of the technical assessment. It is the view of the Commission that such a sharing of the assessment cost is reasonable for the following reasons: 1) the State of origin would have had, in any case, to make such an assessment in accordance with article 12; 2) it would be unfair to expect that the cost of the assessment should be borne by the State that is likely to be injured by an activity in another State and from which it receives no benefit; and 3) if the State of origin is not obliged to share the cost of assessment undertaken by the State likely to be affected, that might serve to encourage the State of origin not to make the impact assessment it should itself have made in accordance with article 12, thereby externalizing the costs by leaving the assessment to be carried out by those States likely to be affected.

(8) The Commission, however, also envisages situations in which the reasons for the absence of notification by the State of origin might be completely innocent. The State of origin might have honestly believed that the activity posed no risk of causing significant transboundary harm. For that reason the State likely to be affected may claim "an equitable share of the cost of the assessment". These words mean that if, following discussion, it appears that the assessment does not manifest a risk of significant harm, the matter is at an end and obviously the question of sharing the cost does not even arise. But if such a risk is revealed, then it is reasonable that the State of origin should be required to contribute an equitable share of the cost of the assessment. This may not be the whole cost for, in any event, the State likely to be affected would have undertaken some assessment of its own. The share of the State of origin would be restricted to that part of the cost which resulted directly from that State's failure to effect a notification in accordance with article 15 and to provide technical information.

Article 20

Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 18, the States concerned shall take into account all relevant factors and circumstances, including:

(a) the degree of risk of significant transboundary harm and the availability of means of preventing or minimizing such risk or of repairing the harm;

(b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) the risk of significant harm to the environment and the availability of means of preventing or minimizing such risk or restoring the environment;

(d) the economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(e) the degree to which the States likely to be affected are prepared to contribute to the costs of prevention;

(f) the standards of protection which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

Commentary

(1) The purpose of this article is to provide some guidance for States which are engaged in consultations seeking to achieve an equitable balance of interests. In reaching an equitable balance of interests, the facts have to be established and all the relevant factors and circumstances weighed.

(2) The main clause of the article provides that in order "to achieve an equitable balance of interests as referred to in paragraph 2 of article 18, the States concerned shall take into account all relevant factors and circumstances". The article proceeds to set forth a non-exhaustive list of such factors and circumstances. The wide diversity of types of activities which is covered by these articles, and the different situations and circumstances in which they will be conducted, make it impossible to compile an exhaustive list of factors relevant to all individual cases. Some of the factors may be relevant in a particular case, while others may not, and still

other factors not contained in the list may prove relevant. No priority or weight is assigned to the factors and circumstances listed, since some of them may be more important in certain cases while others may deserve to be accorded greater weight in other cases. In general, the factors and circumstances indicated will allow the parties to compare the costs and benefits which may be involved in a particular case.

(3) Paragraph (a) compares the degree of risk of significant transboundary harm to the availability of means of preventing or minimizing such risk and the possibility of repairing the harm. For example, the degree of risk of harm may be high, but there may be measures that can prevent or reduce that risk, or there may be possibilities for repairing the harm. The comparisons here are both quantitative and qualitative.

(4) Paragraph (b) compares the importance of the activity in terms of its social, economic and technical advantages for the State of origin and the potential harm to the States likely to be affected. The Commission, in this context recalls the decision in the Donauversinkung case where the court stated that:

> "The interests of the States in question must be weighed in an equitable manner one against another. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by the one to the injury caused to the other." 474/

(5) Paragraph (c) compares, in the same fashion as paragraph (a), the risk of significant harm to the environment and the availability of means of preventing or minimizing such a risk and the possibility of restoring the environment. The Commission emphasizes the particular importance of protection of the environment. The Commission considers Principle 15 of the Rio Declaration relevant to this paragraph where it states: "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." 475/

474/ Wurttemberg and Prussia v. Baden (Donauversinkung case) (1927) in Entscheidungen des Reichsgerichts in Zivilsachen (Berlin, de Gruyter) vol. 116 Appendix, pp. 18-45 (1927), in Annual Digest of Public International Law Cases, (1927-1928) (London, 1931), p. 131; see also Kansas v. Colorado (1907) 206 US 100, and Washington v. Oregon (1936) 297 US 517.

475/ A/CONF.151/26/Rev.1 (vol.I), p. 3.

(6) The Commission is aware that the concept of transboundary harm as used in paragraph (a) might be broadly interpreted and could include harm to the environment. But the Commission makes a distinction, for the purpose of this article, between harm to some part of the environment which could be translated into value deprivation to individuals, and be measurable by standard economic means, on the one hand, and harm to the environment not susceptible to such measurement, on the other. The former is intended to be covered by paragraph (a) and the latter to be covered by this paragraph.

(7) Paragraph (d) introduces a number of factors that must be compared and taken into account. The economic viability of the activity must be compared to the costs of prevention demanded by the States likely to be affected. The cost of the preventive measures should not be so high as to make the activity economically non-viable. The economic viability of the activity should also be assessed in terms of the possibility of changing the location, or conducting it by other means, or replacing it with an alternative activity. The words "conducting [the activity] by other means" intends to take into account, for example, a situation in which one type of chemical substance used in the activity, which might be the source of transboundary harm, could be replaced by another chemical substance; or mechanical equipment in the plant or the factory could be replaced by different equipment. The words "replacing [the activity] with alternative activity" is intended to take account of the possibility that the same or comparable results may be reached by another activity with no risk, or much lower risk, of significant transboundary harm.

(8) Paragraph (e) provides that one of the elements determining the choice of preventive measures is the willingness of the States likely to be affected to contribute to the cost of prevention. For example, if the States likely to be affected are prepared to contribute to the expense of preventive measures, it may be reasonable, taking into account other factors, to expect the State of origin to take more costly but more effective preventive measures.

(9) Paragraph (f) compares the standard of prevention demanded of the State of origin to that applied to the same or comparable activity in the State likely to be affected. The rationale is that, in general, it might be unreasonable to demand the State of origin to comply with a much higher standard of prevention than would be operative in the States likely to be affected. This factor, however, is not in itself conclusive. There may be situations in which the State of origin would be expected to apply standards of prevention to the activity that are higher than those applied in the States

likely to be affected, i.e., where the State of origin is a highly developed State and applies domestically established environmental law regulations. These regulations may be substantially higher than those applied in a State of origin which because of its stage of development may have (and, indeed, have need of) few if any regulations on the standards of prevention. Taking into account other factors, the State of origin may have to apply its own standards of prevention which are higher than those of the States likely to be affected.

(10) States should also take into account the standards of prevention applied to the same or comparable activities in other regions or, if there are such, the international standards of prevention applicable for similar activities. This is particularly relevant when, for example, the States concerned do not have any standard of prevention for such activities, or they wish to improve their existing standards.

CHAPTER VI

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. The law and practice relating to reservations to treaties

382. At its 2376th meeting, on 22 July 1994, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic "The law and practice relating to reservations to treaties".

B. State succession and its impact on the nationality of natural and legal persons

383. Also at its 2376th meeting, on 22 July 1994, the Commission appointed Mr. Vaclav Mikulka Special Rapporteur for the topic "State succession and its impact on the nationality of natural and legal persons".

C. Programme, procedures and working methods of the Commission and its documentation

384. At its 2328th meeting, on 2 May 1994, the Commission noted that in paragraph 10 of resolution 48/31, the General Assembly had requested it

> "(a) To consider thoroughly:
>
> (i) The planning of its activities and programme for the term of office of its members, bearing in mind the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics;
>
> (ii) Its methods of work in all their aspects, bearing in mind that the staggering of the consideration of some topics might contribute, *inter alia*, to a more effective consideration of its report in the Sixth Committee;
>
> (b) To continue to pay special attention to indicating in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work."

385. The Commission agreed that this request should be taken up under item 7 of its agenda entitled "Programme, procedures and working methods of the Commission and its documentation", and that this agenda item should be considered in the Planning Group of the Enlarged Bureau.

386. The Planning Group held three meetings. It had before it the section of the topical summary of the discussion held in the Sixth Committee of the

General Assembly during its forty-seventh session entitled "Programme of work of the Commission" (A/CN.4/457, paras. 432 to 443). Mr. Hans Corell, Under-Secretary General, The Legal Counsel, addressed the Planning Group at its first meeting.

Planning of the activities for the remainder of the quinquennium

387. The current programme of work consists of the following topics: State responsibility; draft Code of Crimes against the Peace and Security of Mankind; international liability for injurious consequences arising out of acts not prohibited by international law; the law and practice relating to reservations to treaties; and State succession and its impact on the nationality of natural and legal persons. 476/

388. In accordance with paragraph 10 (a) (i) of General Assembly resolution 48/31, the Commission considered the planning of its activities for the remainder of the term of office of its members. In doing so, it bore in mind, as requested by that resolution, the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics.

389. The Commission agreed that, while the adoption of any rigid schedule would be impracticable, the setting up of goals in planning its activities would be useful.

390. Taking into account the progress of work achieved on the topics in the current programme as well as the state of readiness for making further progress, and bearing in mind the different degrees of complexity of the various topics, the Commission confirms its intention to endeavour to complete by 1996 the second reading of the draft articles on the Code of Crimes against the Peace and Security of Mankind and the first reading of the draft articles on State responsibility. As regards the topic "International liability for injurious consequences arising out of acts not prohibited by international law", it will endeavour to complete by 1996 the first reading of the draft articles on activities having a risk of causing transboundary harm. It furthermore intends to undertake work on the topics "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons".

476/ The Commission noted that, in paragraph 7 of its resolution 48/31, the Assembly had endorsed the Commission's decision to include in its agenda the last two of the above-mentioned topics, on the understanding that the final form to be given to the work on these topics shall be decided after a preliminary study is presented to the General Assembly.

Contribution of the International Law Commission to the Decade of International Law

391. In accordance with the decision taken by the Commission at its last session, the Working Group set up at the forty-fourth session (1992) to consider the question of the contribution of the International Law Commission to the Decade of International Law met under the chairmanship of Mr. Pellet in order to formulate proposals concerning the issuance, on the occasion of the Decade, of a publication containing studies by members of the Commission. The Working Group included, in addition to its Chairman, Mr. Awn Al-Khasawneh, Mr. James Crawford, Mr. Salifou Fomba, Mr. Ahmed Mahiou, Mr. Pemmaraju Sreenivasa Rao, Mr. Robert Rosenstock, Mr. Alberto Szekely, Mr. Christian Tomuschat, and Mr. Vladlen Vereshchetin.

392. The Chairman of the Working Group indicated that 32 members in addition to himself had expressed readiness to contribute to the publication, on the understanding that contributions would not exceed 15 pages and would be handed over to the Secretariat on 15 June 1995 at the latest. The provisional contents of the publication was agreed upon by the Working Group in the light of the wishes expressed by individual members. In order to minimize the costs, the Working Group recommended that, at this stage, the publication be a bilingual one and include contributions in English or in French, it being understood, however, that the Secretariat will endeavour to ensure the translation into English or French of the contributions which might be submitted in one of the four other official languages of the United Nations.

393. The Commission approved the plan of the publication and the practical ways and means of carrying out the project, as described by the Chairman of the Working Group. It furthermore recommended that the General Assembly consider the possibility of allocating funds for the issuance of the publication in all the official languages of the United Nations and that Member States where national committees for the Decade have been established should encourage those Committees to arrange for the translation and issuance in their respective languages of the publication to ensure the widest possible dissemination of the publication among scholars and students of international law throughout the world.

394. The Commission decided that the Working Group chaired by Mr. Pellet would continue its work to formulate recommendations on other contributions by the Commission to the Decade of International Law, to be submitted to the Commission at the next session.

Documentation of the Commission

395. The Commission was informed that the Chairman of the Commission had received from the Chairman of the Committee on Conferences a communication indicating that the General Assembly, in paragraph 16 of its resolution 47/202 B, had decided that there should be a comprehensive review of, *inter alia*, the need for and usefulness and timely issuance of verbatim and summary records and that, in paragraph 3 of resolution 48/222 B, the Assembly encouraged all bodies currently entitled to written meeting records to review the need for such records and to communicate their recommendations to the General Assembly at its forty-ninth session.

396. The Commission wishes to convey its appreciation to the General Assembly for having maintained the provision of summary records of the meetings of the Commission by its resolution 45/238 B of 21 December 1990 which is recalled in the preambular part of resolution 48/222 B.

397. The Commission has conducted a careful review in response to General Assembly resolution 48/222 B and concluded that the views which it had occasion in the past to express on the matter continue to be valid. Accordingly, it wishes to reiterate them as follows as its recommendations to the General Assembly.

398. The Commission is aware that the cost of providing records of meetings is not insignificant and it does not at all wish to minimize or discourage generalized efforts by the Organization to effect savings and reduce its financial and administrative burden. The Commission feels obliged, nevertheless, to call to the attention of the General Assembly the fact that the question of continuing to provide the Commission with summary records is not exclusively a budgetary and administrative question because it also, and primarily, involves matters of legal policy affecting the process of the promotion of the progressive development of international law and its codification undertaken by the United Nations pursuant to Article 13, paragraph 1 (a), of the Charter. There is no doubt, in the opinion of the Commission, that the discontinuance of summary records of its meetings would affect its procedures and methods of work and have a negative impact on the performance by the Commission of the tasks entrusted to it by the

General Assembly. The need for summary records in the context of the Commission's procedures and methods of work is determined by, inter alia, the functions of the Commission and its composition. As its task is mainly to draw up drafts providing a basis for the elaboration by States of legal instruments, the debates and discussions held in the Commission on proposed formulations are of paramount importance, in terms of both substance and wording, for the understanding of the texts proposed to States by the Commission. On the other hand, pursuant to the Commission's Statute, members of the Commission serve in a personal capacity and do not represent Governments. States have therefore, it is submitted, a legitimate interest in knowing not only the conclusions of the Commission as a whole as recorded in its reports but also those of its individual members contained in the summary records of the Commission, particularly if it is borne in mind that members of the Commission are elected by the General Assembly so as to ensure representation in the Commission of the main forms of civilization and the principal legal systems of the world. Moreover, the summary records of the Commission are also a means of making its deliberations accessible to international institutions, learned societies, universities and the public in general. They play an important role, in that respect, in promoting knowledge of and interest in the process of promoting the progressive development of international law and its codification.

399. The above-mentioned considerations lead the Commission to recommend to the General Assembly the continuing provision of summary records of the meetings of the Commission as well as the continued publication of those summary records in volume I of the Yearbook of the International Law Commission. The continuance of the present system of summary records corresponds to what has been a consistent policy of the General Assembly since the establishment of the Commission, and constitutes an essential requirement for the procedures and methods of work of the Commission and for the process of codification and progressive development of international law in general.

Methods of work

400. The Commission at its last session expressed the intention to review the conditions under which the commentaries are discussed and adopted with a view to the possible formulation of guidelines on the matter. It could not discuss the matter in all its aspects for lack of time. It however agreed that it was desirable that commentaries to draft articles be taken up at as early a stage as possible in the course of each session in order to receive the required

degree of attention and be in any case discussed separately rather than in the framework of the consideration of the Commission's report to the General Assembly. The Commission has already taken steps in that direction at the current session.

401. The Commission intends to hold a comprehensive discussion of the question of commentaries at its next session.

Duration of the next session

402. The Commission reiterates its view that the requirements of the work for the progressive development of international law and its codification and the magnitude and complexity of the subjects on its agenda make it desirable that the usual duration of the session be maintained. The Commission emphasizes that it made full use of the time and services made available to it during its current session.

D. Cooperation with other bodies

403. The Commission was represented at the August 1993 session of the Inter-American Juridical Committee, in Rio de Janeiro, by Mr. Carlos Calero Rodrigues who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. José Luis Siqueiros. Mr. Siqueiros addressed the Commission at its 2358th meeting on 28 June 1994 and his statement is recorded in the summary record of that meeting.

404. The Commission was represented at the 1994 session of the Asian-African Legal Consultative Committee, in Tokyo, by Mr. Vladlen Vereshchetin, who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission. The Asian-African Legal Consultative Committee was represented at the present session of the Commission by the Secretary-General of the Committee, Mr. Tang Changyuan and by Mr. Bhagwat Singh. Mr. Tang addressed the Commission at its 2350th meeting on 7 June 1994 and his statement is recorded in the summary record of that meeting.

405. The Commission was represented at the December 1993 session of the European Committee on Legal Cooperation in Strasbourg by Mr. Gudmundur Eiriksson who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission. The European Committee on Legal Cooperation was represented at the present session

of the Commission by Mr. Hans J. Nilsson. Mr. Nilsson addressed the Commission at its 2360th meeting on 5 July 1994 and his statement is recorded in the summary record of that meeting.

E. Date and place of the forty-seventh session

406. The Commission agreed that its next session, to be held at the United Nations Office at Geneva, should begin on 2 May and conclude on 21 July 1995.

F. Representation at the forty-ninth session of the General Assembly and at the Congress of Public International Law (New York, 13-17 March 1995)

407. The Commission decided that it should be represented at the forty-ninth session of the General Assembly and at the Congress of Public International Law by its Chairman, Mr. Vladlen Vereshchetin. 477/

G. International Law Seminar

408. Pursuant to General Assembly resolution 48/31, the United Nations Office at Geneva organized the thirtieth session of the International Law Seminar during the current session of the Commission. The Seminar is intended for post-graduate students of international law and young professors or government officials dealing with questions of international law in the course of their work.

409. A Selection Committee under the chairmanship of Professor Philippe Cahier (The Graduate Institute, Geneva) met on 18 March 1994 and, after having

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477/ At its 2376th meeting, on 22 July 1994, the Commission requested Mr. James Crawford, Chairman of the Working Group on a Draft Statute for an International Criminal Court to attend the forty-ninth session of the General Assembly under the terms of paragraph 5 of General Assembly resolution 44/35. The Commission addressed a similar request to Mr. Robert Rosenstock, Special Rapporteur on the law of the non-navigational uses of international watercourses, whose attendance of the forty-ninth session will not entail financial implications.

considered some 70 applications for participation in the Seminar, selected 24 candidates of different nationalities, mostly from developing countries. Twenty-three of the selected candidates were able to participate in this session of the Seminar. 478/

410. The session of the Seminar was held at the Palais des Nations from 24 May to 10 June 1994 under the direction of Ms. Meike Noll-Wagenfeld, United Nations Office at Geneva. It was opened by the Chairman of the Commission, Mr. Vladlen Vereshchetin. During the three weeks of the session, the participants in the Seminar attended the meetings of the International Law Commission and lectures specifically organized for them.

411. Several lectures were given by members of the Commission as follows: Mr. Ahmed Mahiou, "The Work of the International Law Commission"; Mr. Vaclav Mikulka, "Succession of States in respect of treaties (some recent developments)"; Mr. Francisco Villagran-Kramer, "Immunity of States from civil and commercial jurisdiction"; Mr. Alexander Yankov, "Legal and institutional implications of United Nations peacekeeping operations".

412. In addition, lectures were given by: Ms. B. Molina-Abram, Office of Legal Affairs, "The War Crimes Commission and the International Criminal Tribunal for the Former Yugoslavia"; Ms. B. Mukherjee, Centre for Human Rights, "The World Conference on Human Rights and its follow-up"; Mr. A. Noll, Legal Adviser, International Telecommunication Union (ITU) "Specific features of the new Constitution and Convention of the ITU, Geneva 1992, in the light of the Vienna Convention on the Law of Treaties, 1969"; Ms. D. Plattner, Counsellor, Legal Division, International Committee of the Red Cross (ICRC), "Mandate and legal statute of the ICRC"; Mr. F. Roessler, Director, Legal Affairs Division, GATT, "The World Trade Organization: Some legal aspects".

478/ The list of participants in the thirtieth session of the International Law Seminar is as follows: Mr. Jassem Bin Nasser Al Thani (Qatar); Ms. Kangne Barry (Guinea); Mr. Eugen Carpov (Moldova); Ms. Carmen Isabel Claramunt (Costa Rica); Mr. Petrus Compton (Saint-Lucia); Mr. Pierre D'Argent (Belgium); Mr. Ehud-Moshe Eitam (Israel); Mr. Mete Erdem (Turkey); Ms. Socorro Flores-Liera (Mexico); Mr. Brahima Fomba (Mali); Mr. Ghazi Gherairi (Tunisia); Mr. Jian Guan (China); Mr. Munyaradzi Gwisai (Zimbabwe); Ms. Aymée Hernandez Quesada (Cuba); Mr. Adolf Huala (Indonesia); Mr. Bernard Kishoiyian (Kenya); Ms. Evaggelia Kleftodimou (Greece); Mr. Milan Kollar (Slovakia); Ms. Elvira Mendez Chang (Peru); Mr. Sergeiy Meshcheryak (Ukraine); Ms. Michèle Olivier (South Africa); Mr. Kégham Tamamian (Syria); Ms. Deepika Udagama (Sri Lanka).

413. Three Working Groups were created at the initiative of Mr. Christian Tomuschat, which dealt with the following topics: (1) "Legal basis for the establishment of an International Criminal Court", under the tutorship of Mr. Francisco Villagran-Kramer; (2) "International Crimes - Article 19 of the draft articles on State Responsibility", under the tutorship of Mr. Gaetano Arangio-Ruiz; (3) "Reservations to Multilateral Treaties", under the tutorship of Mr. Christian Tomuschat. Each Working Group elaborated a paper on its topic which was presented orally and a copy of which was made available to the members of the Commission.

414. As it has become a tradition for the Seminar, the participants enjoyed the hospitality of the Republic and Canton of Geneva.

415. At the end of the session of the Seminar, Mr. Vladlen Vereshchetin and Ms. Noll-Wagenfeld, on behalf of the Director-General of the United Nations Office at Geneva, addressed the participants. Mr. Ghazi Gherairi addressed the Commission on behalf of the participants. In the course of this brief ceremony, each of the participants was presented with a certificate attesting to his or her participation in the thirtieth session of the Seminar.

416. Voluntary contributions from Member States to the United Nations Trust Fund for the International Law Seminar permit the granting of fellowships in particular to participants from developing countries. The Commission noted with particular appreciation that the Governments of Austria, Denmark, Finland, France, Germany, Iceland, Norway, Slovenia and Switzerland had made voluntary contributions to that Fund. Thanks to those contributions it was possible to award a sufficient number of fellowships in order to achieve adequate geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise have been prevented from participating in the session. This year, full fellowships (travel and subsistence allowance) were awarded to 14 participants and partial fellowships (subsistence only) could be given to 2 participants. Thus of the 667 participants, representing 132 nationalities, who have taken part in the Seminar since its inception in 1964, fellowships have been awarded to 359.

417. The Commission stresses the importance it attaches to the sessions of the Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their

headquarters in Geneva. As all the available funds are exhausted, the Commission recommends that the General Assembly should again appeal to States which can do so to make the voluntary contributions that are needed for the holding of the Seminar in 1995 with as broad a participation as possible.

418. The Commission noted with regret that in 1994 very limited interpretation services had been made available to the Seminar and it expressed the hope that every effort would be made to provide the Seminar at future sessions with full services and facilities despite existing financial constraints.